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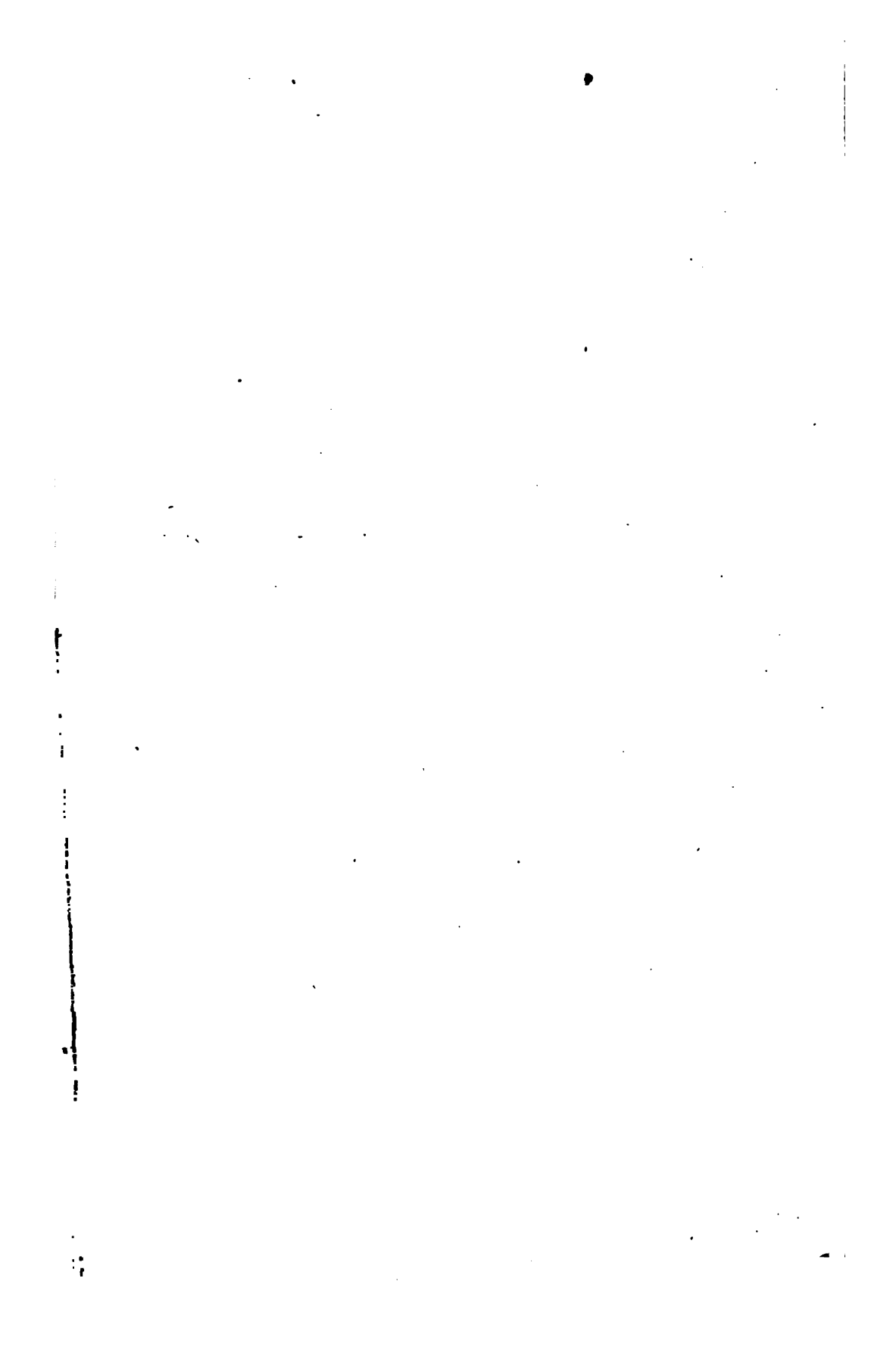
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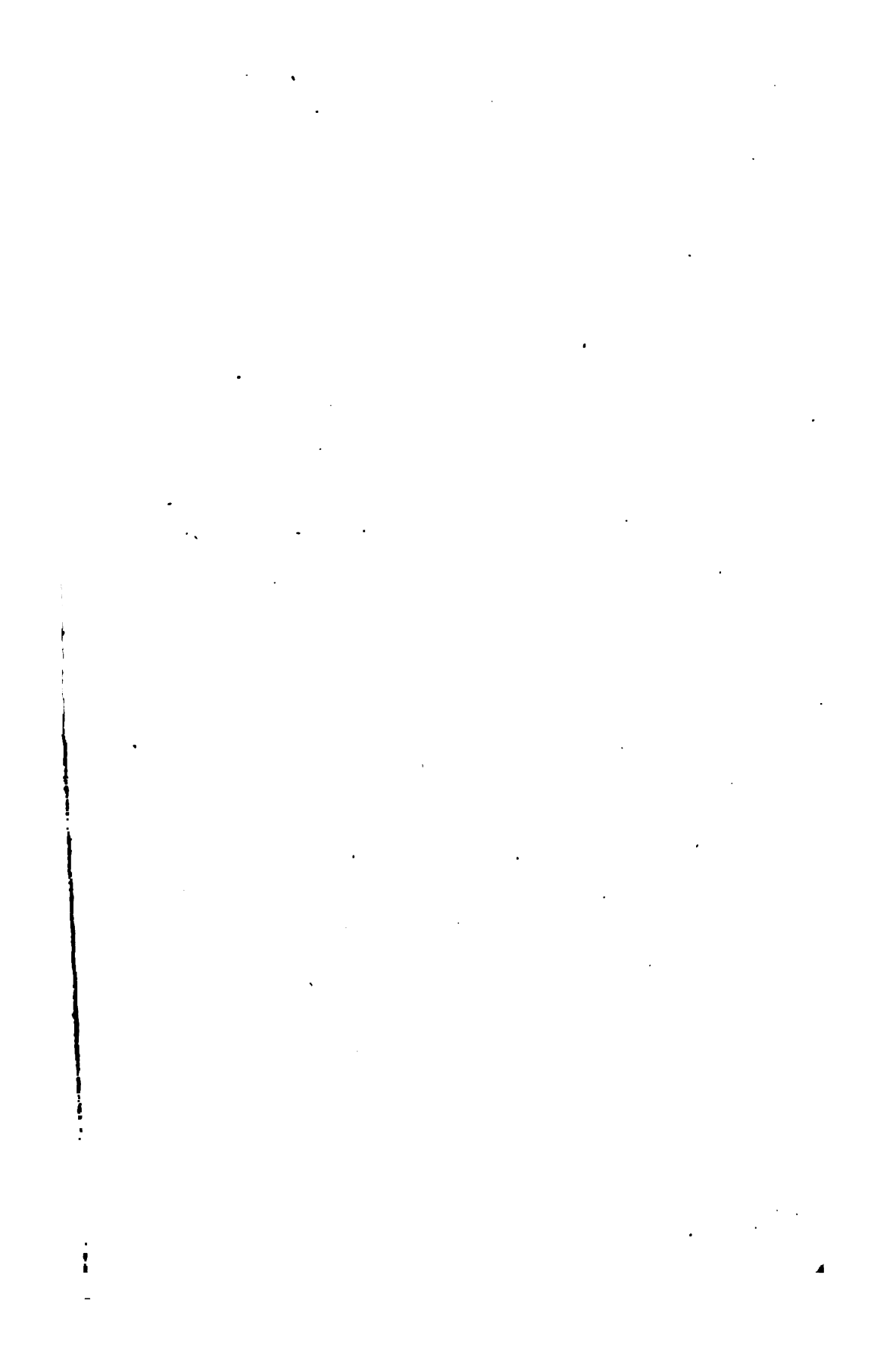
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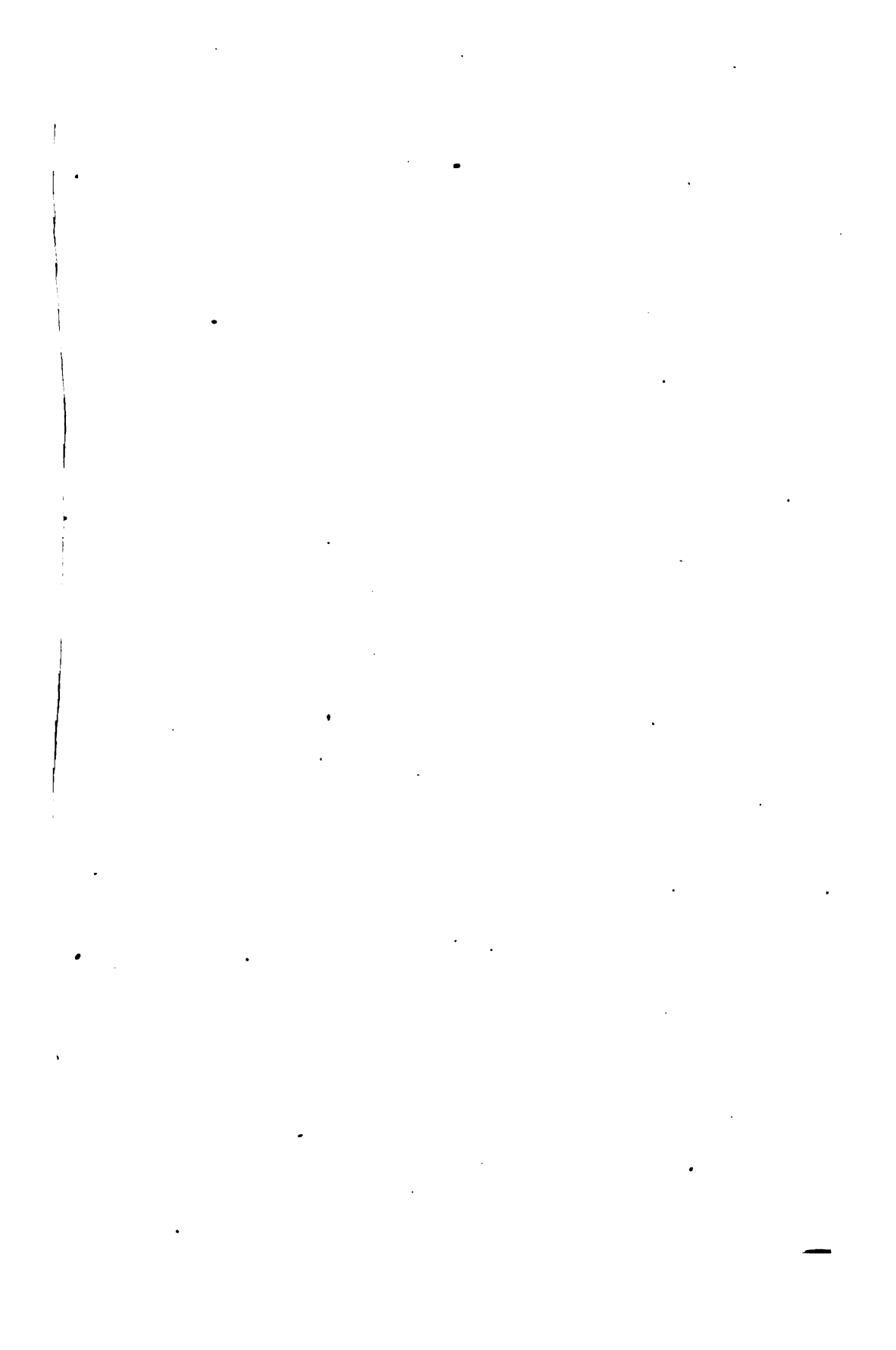




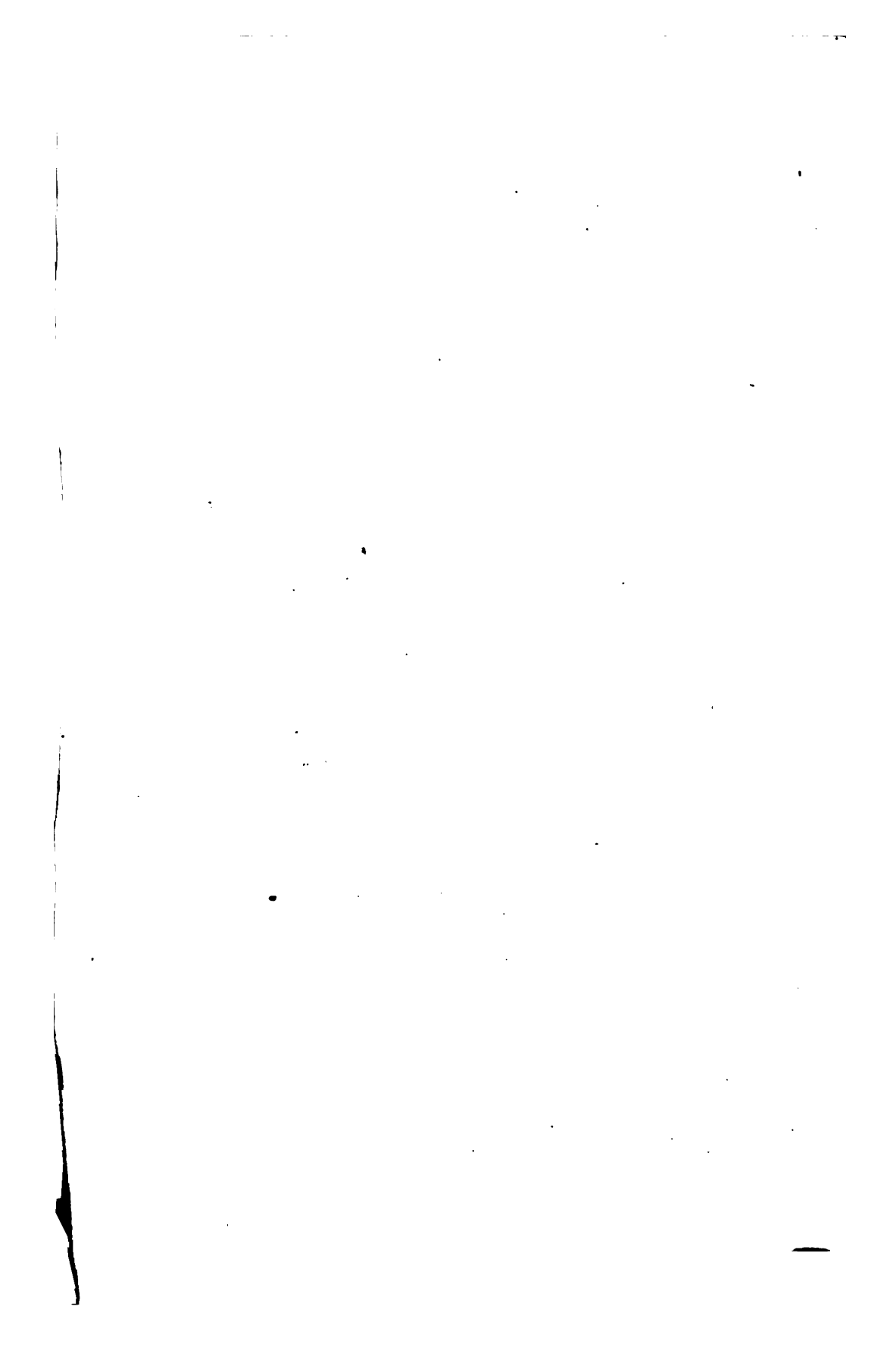










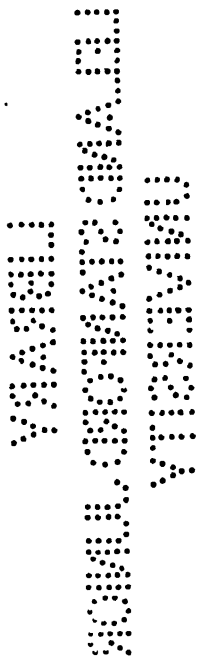






REPORTS  
OF  
CASES ARGUED AND ADJUDGED  
IN THE  
**Court of Appeals of Maryland,**  
AND IN THE  
HIGH COURT OF CHANCERY OF MARYLAND,  
FROM  
FIRST HARRIS & McHENRY'S REPORTS TO FIRST  
MARYLAND REPORTS.  
ANNOTATED BY  
WILLIAM T. BRANTLY,  
OF THE BALTIMORE BAR.  
VOLUME V.  
CONTAINING THE FIRST VOLUME OF HARRIS & JOHNSON'S REPORTS.

BALTIMORE:  
M. CURLANDER,  
LAW BOOKSELLER, PUBLISHER AND IMPORTER.  
1883.



95142

BALTIMORE:  
WM. K. BOYLE & SON,  
PRINTERS.

**NAMES OF THE JUDGES**  
 OF THE  
**GENERAL COURT AND COURT OF APPEALS, &c.**  
 OF THE  
**STATE OF MARYLAND,**  
 DURING THE TIME OF THESE REPORTS.

---

**OF THE GENERAL COURT.**

	APPOINTED.
<b>JEREMIAH TOWNLEY CHASE</b> , Chief Judge,	8th February, 1799.
<b>GABRIEL DUVAL</b> , (a) Judge,	2d April, 1796.
<b>JOHN DONE</b> , “	8th February, 1799.
<b>RICHARD SPRIGG</b> , “	29th December, 1802.

**OF THE COURT OF APPEALS.**

	APPOINTED.
<b>BENJAMIN RUMSEY</b> , Chief Judge,	22d December, 1778.
<b>BENJAMIN MACKALL</b> , Judge,	22d December, 1778.
<b>THOMAS JONES</b> , “	22d December, 1778.
<b>RICHARD POTTS</b> , “	10th October, 1801.
<b>LITTLETON DENNIS</b> , “	20th October, 1801.

**OF THE COURT OF CHANCERY.**

	APPOINTED.
<b>ALEXANDER CONTEE HANSON</b> , Chancellor,	3d October, 1789.

**OF THE COUNTY COURTS.**

**FIRST DISTRICT. (b)**

	APPOINTED.
<b>MICHAEL JENIFER STONE</b> , Chief Justice,	17th January, 1791.
<b>RICHARD SPRIGG</b> , Junior, “ “	28th June, 1802.
<b>JOHN MACKALL GANTT</b> , “ “	11th February, 1803.

(a) He resigned in 1802, on being appointed Comptroller of the Treasury of the United States.

(b) Comprehending the Counties of Saint Mary's, Calvert, Prince George's and Charles.

## NAMES OF JUDGES.—1 H. &amp; J.

## SECOND DISTRICT. (a)

	APPOINTED.
JAMES TILGHMAN, Chief Justice,	17th January, 1791.

## THIRD DISTRICT. (b)

	APPOINTED.
HENRY RIDGELY, Chief Justice,	25th November, 1796.

## FOURTH DISTRICT. (c)

	APPOINTED.
WILLIAM WHITTINGTON, Chief Justice,	25th February, 1799.
WILLIAM POLK, " "	28th January, 1802.

## FIFTH DISTRICT. (d)

	APPOINTED.
RICHARD POTTS, Chief Justice,	15th October, 1796.
WILLIAM CRAIK, " "	20th October, 1801.
WILLIAM CLAGGETT, " "	28th January, 1802.

## OF THE COURT OF OYER AND TERMINER, &amp;c.

	APPOINTED.
WALTER DORSEY, Chief Justice,	9th February, 1800.

## ATTORNEY-GENERAL.

	APPOINTED.
LUTHER MARTIN,	11th February, 1778.

- (a) Comprehending the Counties of Cecil, Kent, Queen Anne's and Talbot.
- (b) Comprehending the Counties of Anne Arundel, Baltimore and Harford.
- (c) Comprehending the Counties of Caroline, Dorchester, Somerset and Worcester.
- (d) Comprehending the Counties of Washington, Frederick, Montgomery and Allegany.

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C A S E S

ARGUED AND DETERMINED

IN THE

GENERAL COURT AND COURT OF APPEALS

OF THE

STATE OF MARYLAND.

---

\* GENERAL COURT, (E. S.) APRIL TERM, 1800. 1

COLLINS *et ur.* Lessee *vs.* ELLIOTT.

**Depositions** not appearing on their face to have been taken according to notice, both as to time and place, cannot be given in evidence, and evidence is not admissible to prove that they were in fact taken according to the notice. (a)

**The** declarations of a testator, or of the witnesses, or of the draftsman of a will, are not admissible to establish the same. (b)

**One** witness is sufficient to prove all the requisites made essential to the validity of a will by the Statute of Frauds; but where all the witnesses

(a) Approved in *Young vs. Mackall*, 4 Md. 368. Cf. *Quynn vs. Carroll*, 22 Md. 296. In the case of depositions *de bene esse*, taken under the Act of 1828, c. 165, (Code, Art. 37,) a strict compliance with the requirements of the statute and the order of Court must appear in the commissioner's return. But the presence of the adverse party, by his counsel, and his cross-examination of the witness, is equivalent to an agreement to waive any irregularity as to the time and place, when or where the deposition is taken. *Williams vs. Banks*, 5 Md. 198. If the execution of a commission to take testimony be irregular in the omission to give notice to the parties interested, or for other cause, the proper course is, not to wait until the final hearing and then seek to have the evidence excluded, but, within a reasonable time after the return, to move for the suppression of the evidence. *Barnum vs. Barnum*, 42 Md. 295. Cf. *Calvert vs. Coxe*, 1 G. 95.

(b) See *Collins vs. Nicols*, post, m. p. 399; *Stocksdale vs. Cullison*, 35 Md. 322.

are dead, proof of the hand-writing of the testator and of all the witnesses is necessary. (c)

EJECTMENT for a tract of land called Tully's Addition Corrected, also Tully's Addition and Roe's Lane. The plaintiff's lessors claimed title as devisees under the will of Samuel Roe, deceased, dated the 5th of May, 1776. An objection was made in the Orphans' Court in April, 1777, to the probat of this will. The witnesses to the will were dead.

1. The question before this Court was, whether it was the will of Samuel Roe? Several witnesses were examined in Court, and the deposition of other witnesses read in evidence to the jury, to prove the will. An objection was made to the deposition of Solomon Williams being read in evidence, because it did not appear to be taken according to notice as to time and place; that it was only evidence against the party, and those claiming under him; and that the notice ought to have been in writing.

2 \* CHASE, Ch. J.—The Court are of opinion that it ought to appear by the depositions themselves that they were taken agreeably to the notice, both as to place and time, or they cannot be read in evidence; and that proof cannot now be admitted to show that they were in fact taken according to the notice.

2. The declarations of Samuel Roe, the testator, that he made a will, and those of the witnesses that they signed a will, made by Samuel Roe, as witnesses, and those of the person by whom the will had been drawn, that he had written the will of Samuel Roe, were offered in corroboration of the testimony adduced, to prove the will in controversy, but were objected to.

*Wright and Key*, for the defendant, contended, that in a case like the present, hearsay evidence could not be admitted, and cited *Gilb. L. E.* 153; 12 *Vin. Ab.* 118 a, b; 39, pl. 7; *Bull. N. P.* 294, 295; *Pow. on Dev.* 79.

*Martin*, (Attorney-General,) and *J. Scott*, contra, cited *Peate vs. Ougly*, *Com. Rep.* 197; *Hands vs. James*, *Com. Rep.* 531; *Croft vs. Pawlet*, 2 *Stra.* 1109; *Lemain vs. Stanley*, 3 *Lev.* 1; *Lowe vs. Jolliffe*, 1 *Blk. Rep.* 365; *Bull. N. P.* 264; *Goodtitle vs. Clayton et al.* 4 *Burr.* 2224; *Esp.* 784; 1 *Eq. Ab.* 403; *Pow. on Dev.* 33, 130, 132, 165, 187, 129.

CHASE, Ch. J.—The Court are of opinion that such declarations as those offered to be given in evidence cannot be received to establish the will.

The Chief Judge said that one witness would be sufficient to prove all the circumstances or requisites made essential by the Statute of

(c) See *Welby vs. Welby*, 8 Md. 15.

Frauds; but where all the witnesses were dead, proof of the handwriting of the testator, and of all the witnesses, was necessary. The plaintiff excepted.

Verdict and judgment for the defendant. The plaintiff appealed to the Court of Appeals, and at December Term, 1808, the judgment of the General Court was affirmed.

\* GENERAL COURT, (E. S.) APRIL TERM, 1800. 3

GARRETT vs. HUGHLETT, *Err. de son tort* of DIXON.

The Act of Assembly requiring bills of sale of personal property to be acknowledged and recorded within a limited time, was designed to remove the presumption of fraud arising from the vendor's continuing in possession, but a bill of sale may be proved to be fraudulent from other circumstances. (a)

A distress for rent in arrear, to be lawful, must be made agreeably to the statute of 2 W. & M. c. 5. (b)

SCIRE FACIAS upon a judgment obtained in this Court, on a verdict in an action of trespass for *mesne* profits, brought by the present plaintiff against Dixon in his life-time. On the day before the judgment, Dixon had conveyed all his real estate by deed to the present defendant; and after the judgment, upon the payment of certain sums of money by the defendant for him, he (Dixon) made a bill of sale of his negroes also to the present defendant. The defendant afterwards distrained upon Dixon for rent accruing for the use of the premises, so as aforesaid conveyed by the deed before mentioned, and of which Dixon had continued in possession, and some personal property of Dixon was sold under the distress, the proceeds of which came to the hands of the defendant after Dixon's death.

*Hammond*, for the plaintiff contended, that the defendant had made himself executor *de son tort* of Dixon, upon two grounds. *First*. That the bill of sale being fraudulent, (Dixon continuing in the possession of the negroes,) the receipt of the negroes, after the death of Dixon, was such an unlawful intermeddling with his goods, as made the defendant an executor *de son tort*. *Secondly*. That the distress being irregular and illegal, the sale of Dixon's goods, and the receipt of the proceeds thereof by the defendant, made him an executor *de son tort* in like manner.

The illegality of the distress was in not complying with the requisites of the statute of 2 W. & M. sess. 1, ch. 5.

*Bullitt*, for the defendant, in reply to the first ground, contended, that inasmuch as the bill of sale was duly acknowledged and recorded,

(a) See *Cooke vs. Cooke*, 43 Md. 522; *Bohn vs. Headley*, 7 H. & J. 257.

(b) See *Alex. Br. Stat.* 569.

according to the requisites of the Act of Assembly, it could not be deemed fraudulent.

4 \* THE COURT were of opinion, that such a bill of sale might be deemed fraudulent from other circumstances than the continuance of possession. The Act of Assembly, by requiring the bill of sale to be acknowledged and recorded within a limited time, intended by those circumstances of notoriety to take off the presumption of fraud arising from the vendor's continuing in possession. But if there were other circumstances attending the transaction, which tended to shew it fraudulent, those circumstances might be given in evidence.

The Court were also of opinion that the distress was illegal. Verdict for the defendant.

N. B. This seems to be a judicial decision, that the above mentioned statute of 2 W. & M. sess. 1, ch. 5, is in force in this State.

#### GENERAL COURT, (E. S.) APRIL TERM, 1800.

##### CORNFUTE vs. DALE.

Trespass will not lie by a master for an assault and battery on his slave, unless it be attended with a loss of service.

THIS was an action of trespass for an assault and battery committed by the defendant on the plaintiff's slave.

The question was, Whether such an action was maintainable?

*Bullitt*, for the plaintiff, contended, that although no case was to be found in the books directly in point, slavery not being known in England, yet upon the principle of its being a violation of the plaintiff's property, in which case, generally speaking, an action of trespass is supportable at common law, this action ought to be sustained. That it was not essential to prove a loss of service in order to support such an action, he cited *Barnes' Notes*, 452; 6 *Instr. Cler.* 622, 633;

5 (which cites 2 *Lutic.* 1481;) 20 *Viner*, \* 454, pl. 8; (which cites *Bro. Abr. Tresp.* pl. 442, the case in the *Year Book* of 20 H. VII, ch. 5.)

He further observed, that he had been applied to some years before, by Colonel Lloyd, to bring an action against a person for beating one of his slaves; that he at first expressed to him his doubt whether the action lay in such case, and that Colonel Lloyd obtained the late Mr. Jenings' written opinion, which he shewed to him, and which was to this purpose:—That he had brought such actions himself, and had often known them brought in the Provincial Court. Upon which, Mr. Bullitt said, he brought the ac-

tion for Colonel Lloyd, and no objection to it of that kind was taken.

*J. Bayly, contra*, for the defendant, cited 2 *Stra.* 872, *Slater vs. Swann*, where Lord Ch. J. Raymond said, "that an assault on a horse was no cause of action, unless accompanied with a special damage."

The case was postponed for further consideration until the next day, when judgment was entered for the defendant.

CHASE, Ch. J.—Assigned, among other reasons for the decision in this case, that the action did not lie, because there was not a reciprocity of action, no action being maintainable against a master for an assault and battery committed by his slave; and that the injury to the slave was not dispunishable, it being indictable as an offence, and that without an injury or wrong to the master, no action could be sustained.

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\* GENERAL COURT, MAY TERM, 1800.

6

WEST'S Lessee vs. HUGHES et al.

A *fi. fa.* issued by a Justice of the Peace on a judgment recovered on warrant held to be void for the want of a return day, and no title passed under a sale of the land made in pursuance thereof. (a)

Where a grant of a tract of land operated by relation from the date of the certificate of survey, and vested the legal title in the land in the grantee on the day of the survey. (b)

EJECTMENT for a tract of land called Jarrett's Disappointment, lying in Harford County. Defence was taken on warrant and plots were made.

1. The plaintiff, at the trial, in support of the issue on his part, produced and read in evidence to the jury, a patent granted to the lessor of the plaintiff on the 20th of May, 1797, for the tract of land called Jarrett's Disappointment, for which the ejectment was brought, surveyed on the 8th of June, 1795, in virtue of a proclamation warrant issued on a tract of land called Little Contestable, being a resurvey on Amos and Myers' Puzzle, containing 115½ acres.

The defendants offered in evidence to the jury, a warrant issued by Nathan Smith, who, it is admitted, was at the time a justice of the peace for Harford County, duly commissioned and sworn, and in which said county, it is admitted, the defendants in the said warrant mentioned, reside, and did reside at the time of issuing the

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(a) See Rev. Code, Art. 68, secs. 36-38; Act of 1880, c. 400; *Candler vs. Fisher*, 11 Md. 332; *Coombs vs. Jordan*, 3 Bl. 309.

(b) See *Garretson vs. Cole*, 2 H. & McH. 459, note.

said warrant, which warrant is as follows, to wit: "Harford County. *sc.* Arrest David West and Benjamin West, and them have before a justice of the peace for said county, to answer Samuel Bond in a plea of debt. Given under my hand and seal this third day of April, 1797.

N. SMITH, (L. S.)"

"To any Constable."

The defendants then offered evidence to prove, that David West, one of the defendants mentioned in the said warrant, and who is the lessor of the plaintiff in this cause, was arrested by one of the constables of the said county, and appeared under the said warrant before Nicholas Day M'Comas, who, it is also admitted, at that time was, and still is, one of the justices of the peace for said county, duly commissioned and sworn; who, on the 9th day of May, 1797, gave judgment against the said David West in the following words, to wit: "Judgment against the defendant for three pounds nineteen  
 7 shillings debt, with interest\* from the 9th of January, 1797, until paid, and four shillings and four pence half penny costs, this 9th of May, 1797. NICHAS. D. M'COMAS."

That on the 12th of May, 1797, Thomas S. Bond, who it is also admitted at that time was, and still is, one of the justices of the peace for the said county, duly commissioned and sworn, issued an execution on the said judgment in the words following, to wit: "Sheriff of Harford County: Make and levy as much of the goods and chattels, lands and tenements, of David West, as will satisfy and pay Samuel Bond three pounds nineteen shillings debt, with interest from the 9th of January, 1797, until paid, and four shillings and four pence half penny costs, and all additional costs, agreeable to a judgment hereto annexed, rendered by Nicholas D. M'Comas, Esquire, and this shall be your authority. Given under my hand and seal this 12th day of May, 1797. THOMAS S. BOND, (L. S.)"

That the said execution was delivered to the sheriff of the said county, who on the thirteenth day of May, 1797, laid the same on the land in the patent aforesaid mentioned, and for which this ejectment is brought; and that on the 19th of May, 1797, the same land was exposed to public sale by the sheriff aforesaid, and was purchased by Jesse Jarrett, he being the highest bidder for the same; and on the 27th of August, 1798, the said Jarrett obtained from the said sheriff, (Robert Amos, junior,) a deed for the said land, reciting "that whereas the said Robert Amos, as sheriff for the county aforesaid, by virtue of a writ of *fieri facias*, to him directed from Thomas S. Bond, Esquire, one of the justices of the peace for the county aforesaid, on a judgment obtained by Samuel Bond, against David West, did on the 19th of May, 1797, expose to public sale all that tract or parcel of land, situate in the county aforesaid, called Jarrett's Disappointment, the property of the said David West, and which said land was, by the said Jesse Jarrett, on the day aforesaid,



purchased for the sum of 14*l.* 8*s.* 9*d.* current money he being the highest bidder for the same." &c.

\*The plaintiff then prayed the opinion of the Court, and their direction to the jury, that the sale made under the proceedings aforesaid was void; and that no title could be made under the same, there being no return days to either the warrant, or the execution issued on the judgment obtained as aforesaid. 8

CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.) The Court are of opinion, that the execution issued by Thomas S. Bond as aforesaid, is void for the want of a return day, and that no title can be made under the sale made in pursuance thereof. The defendants excepted.

2. The plaintiff, to make title to the land in the declaration of ejectment mentioned, shewed in evidence to the Court and jury, that on the 8th of February, 1794, one Jesse Jarrett, obtained a warrant of resurvey upon a tract of land called Amos and Myers' Puzzle; that in virtue of that warrant a certificate of resurvey was made and returned to the land office for the said Jarrett, bearing date the —day of January, 1795, wherein the land so surveyed, with the vacancy thereby added, was called Little Contestable; that the said Jarrett having failed to pay the caution money for the vacant land contained in the said certificate within the time prescribed by law, David West, the lessor of the plaintiff, upon the 4th of May, 1795, obtained a proclamation warrant to affect the said vacant land; that on the 8th of June, 1795, the said West procured a certificate to be made and returned to the land office, in virtue of the said proclamation warrant, upon which certificate the said West afterwards compounded, and on the 20th of May, 1797, obtained a patent for the land, by the name of Jarrett's Disappointment, which land is located upon the plots in the cause.

The defendants then offered evidence to the Court and jury, that the said Jesse Jarrett, in the year 1784, purchased of the intendant of the revenue of the State of Maryland, a tract or parcel of land, then held under lease and within the reserve of — manor in Harford County, called The Hills of Poverty; that in \* virtue of the said contract a survey was made of the said land on the 22d of January, 1789, and a certificate returned to the land office on the 11th of February, 1789, in the name of the said Jarrett, of a tract or parcel of the reserve land in Harford County, containing 1,832 acres, and called Contestable Manor; that the said certificate being caveated, the Judge of the land office, on the 28th of July, 1794, made an order "that the surveyor correct the said certificate by excluding such part of the land therein called Beautiful Plain, patented to Samuel Richardson, and that he return a corrected certificate for the remaining quantity." That on the 9th of February, 1795, the cor- 9

rected certificate, made on the 26th of January, 1795, containing 1,483 acres, was returned; and on the 20th of May, 1795, the Judge of the land office, at the instance of the said Jarrett himself, made a second order for correcting the said certificate, viz. "The party having suggested that a mistake was committed in executing the former order, it is ordered, that if a mistake shall appear, the same be corrected by the surveyor of Harford County, by making his correction agreeably to the said former order." That on the 18th of May, 1796, another corrected certificate, made on the 2d of May, 1796, containing 1,392 acres, was returned; that on the 13th of July, 1796, the above named David West caveated the last mentioned certificate, and on the 20th of September 1796, the Judge of the land office again made an order for correcting the said Jarrett's certificate, viz. "The Chancellor proceeded to a hearing of the caveat against this certificate, in course of which David West's certificate of Jarrett's Disappointment was produced. The said certificate is endorsed with an order directing it to be corrected, by excluding such part as lies, according to the plot for illustration in the cause, and the recorrected certificate of Contestable Manor, within the lines of said Contestable Manor. On the hearing of the caveat of Jarrett's Disappointment, it was not suggested that this certificate, which is the recorrected

**10** certificate aforesaid, was erroneous,\* and the present caveat amounts in fact to an application for a reconsideration of the caveat against Jarrett's Disappointment; for according to the practice of this office, and agreeably to the principles of common sense, whenever the same land is contained in the certificates of both parties to a caveat, it is considered, that each of the parties has caveated his antagonist. On this ground then, the certificate of the recorrected certificate of Contestable Manor, is to be considered as having been caveated by David West, as well as Jarrett's Disappointment was caveated by Jesse Jarrett. It does not appear, however, on the examination of the recorrected certificate of Contestable Manor, that the surveyor has strictly pursued the directions of the Chancellor's order for recorrection. It appears on the contrary, that he has made out the recorrected certificate with attention to an order given on another caveat, which in no manner related to the order for recorrection, and in consequence thereof has even made a beginning of Contestable Manor, different from the beginning mentioned in Calder's (a) certificate of Contestable Manor, which he was directed to pursue; and he has made out courses different from the courses in the certificate, which he was directed to recorrect, without assigning any reason for so doing. Jesse Jarrett asserts, that the difference of courses arises from the surveyor's pursuing certain calls in Calder's certificate. If that be the case, the surveyor ought to have certified, that the difference arose from pursuing the calls in Calder's certifi-

(a) The first certificate was returned by James Calder.

cate. If also the determination on the caveat of the certificate of Belgrade ought to have any influence on the certificate of Contestable Manor, Jesse Jarrett ought to have applied for a new order of correction. The Chancellor, however, can confirm, when done, that which he might originally have ordered to be done. If then the surveyor will correct the recorrected certificate of Contestable Manor, by certifying that he has pursued the calls of Calder's certificate, and that he hath laid down the said tract of Contestable Manor, as by James \*Calder certified to be laid down January 22d, 1789, except that he hath excluded such part thereof, as is contained in a tract of land called Beautiful Plain, patented to Samuel Richardson, and hath excluded likewise such part as is not contained in a certificate called The Hills of Poverty, and will likewise return the corrected certificate of Contestable Manor, which was endorsed to be recorrected, and will return the recorrected certificate also, along with the corrected certificate thereof, there will be no obstacle arising from the present caveat of David West to the said Jesse Jarrett's obtaining a patent for the land. **11**

It is thereupon adjudged and ordered, that the surveyor of Harford County return a corrected certificate of the recorrected certificate of Contestable Manor, if he can do so consistently with truth and the duty of his office, agreeably to what is herein before suggested; and that he return likewise this certificate along with the corrected certificate of Contestable Manor.

That on the 8th of May, 1797, the said Jesse Jarrett returned his said certificate again corrected, made on the 8th of May, 1797, [whereby Contestable Manor is laid down in two separate tracts, No. 1 containing 1,302 acres more or less, and No. 2 containing 144 acres more or less—both together containing 1,446 acres.]

That the following memorandums were entered on the said certificate, to wit: "This certificate was lodged in the land office the 18th, 19th or 20th of May, 1797, but not entered, because the propriety of receiving it as a proper certificate, depended on the Chancellor's determination whether the order for the correction of Contestable Manor was complied with."

"Test,

JNO. CALLAHAN, Reg. L. O. W. S."

And on the 20th day of December, 1797, the Judge of the land office made the following remarks on the said certificate, to wit: "The Chancellor passed an order in favor of David West, who could not correct his certificate of Jarrett's Disappointment within the nine months limited by law, unless Jesse Jarrett, \* within a reasonable time, should return his recorrected certificate of Contestable Manor, to leave out every part of which Jarrett's Disappointment was to be corrected. The said order was, in effect, that unless the said recorrected certificate should be returned within four months, the said West should, on application, be entitled to a patent, notwithstanding the former order for correcting Jarrett's Disappointment. Just **12**

before the expiration of the four months, this certificate was returned, as a recorrected certificate of Contestable Manor, laid down agreeably to the orders passed, which directed no land to be included, that was not included in The Hills of Poverty: But the Chancellor, on examination of the original certificate of The Hills of Poverty, and comparing it with this certificate, perceived plainly, as he then noted, that one of the courses of The Hills of Poverty was not pursued, and that the alteration made The Hills of Poverty contain more than it would do, if the course in the original had been pursued. He therefore, on West's application, allowed him the benefit of the order passed in his favor. It is now suggested by Jarrett, that the courses of The Hills of Poverty, and particularly the 19th line thereof, are entered in the surveyor's book as laid down in this certificate; and he produces a copy of the said courses, as so entered, under the surveyor's hand, which copy says, S. 32, W. It appears too on the face of the original certificate, which had been the only voucher to satisfy the Chancellor relative to the courses of The Hills of Poverty, that the 19th course had been altered, both in the body and in the table, both saying S. 82, and that most probably it was at first S. 32, because, on scrutinizing the plot, it is discovered that lines have been erased, and that before the erasure, the 19th line was actually laid down S. 32, W. It is alleged also by Jarrett, that always in running The Hills of Poverty, and returning any certificate in which the same was contained or considered as a foundation of the survey, the said 19th line has been considered to be S. 32, W. What then can the Chancellor do after the various transactions

**13** \* which have taken place on the disputes relative to Contestable Manor, which it has not yet been in his power to settle? He conceives, from what is stated, and it is now admitted by Jarrett, that he could not, at the time of returning this certificate, consider it as a recorrected certificate of Contestable Manor, laid down agreeably to the several orders on the subject, all of which directed the same thing, viz. to let Contestable Manor contain no land not contained in The Hills of Poverty. But, inasmuch as it now appears to the Chancellor, that the 19th line of The Hills of Poverty was really intended to be S. 32, W. and if so, that this certificate contains no land not comprehended in The Hills of Poverty, he conceives that it may be received, and stand as a certificate of Contestable Manor, recorrected, as it ought to be, until the contrary be regularly shewn, and that the period for which it is to stand is the day of its return." (a)

(a) Memorandum made by the Register—"The Chancellor having by his note determined that this was to be considered as a proper certificate, and that the period from which it is to stand, is the day of its return, (which was on the 18th, 19th or 20th of May last, it was not liable to a caveat agreeably to a law after six months from such return.

"December 20, 1797.

JOHN CALLAHAN, Reg. L. Off. W. S."

That on the 16th of March, 1798, the said Jarrett obtained a patent upon the said last mentioned corrected certificate, for the land called Contestable Manor, No. 1, and Contestable Manor, No. 2. That the land in the said patent mentioned, and called Contestable Manor, No. 2, is located on the plots in this cause.

The defendants then prayed the opinion of the Court, and their direction to the jury, that the contract aforesaid made by the said Jesse Jarrett with the intendant of the revenue, and the certificate aforesaid returned in virtue thereof, and the patent issued as aforesaid on the same, gave and vested a prior title to the land mentioned in the patent issued to the said Jarrett.

CHASE, Ch. J. The Court are of opinion, that the patent obtained by Jesse Jarrett on the 16th of March, 1798, operates by relation from the 11th of February, 1789, the date of the certificate of the said Jarrett for the land called Contestable Manor, and vested the legal \* title in the land, mentioned in the said patent, in the said Jarrett, on the said 11th of February, 1789. 14

The plaintiff excepted. Verdict and judgment for the plaintiff for all the land included in the patent of Jarrett's Disappointment, which is not included within the lines of the land called Contestable Manor No. 2, as located on the plots in this case returned, by the black dotted lines.

*A. Hall, Hollingsworth and Mason*, for the plaintiff.

*Martin*, (Attorney-General,) *Key and Johnson*, for the defendants.

The plaintiff and defendants both appealed to the Court of Appeals; and the judgment of the General Court was affirmed in both cases, at November Term, 1802, the Court of Appeals concurring with the General Court in the opinions expressed in both of the bills of exceptions.

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## GENERAL COURT, MAY TERM, 1800.

### GITTINGS' Lessee *vs.* HALL.

A person being in possession of part of a tract of land under a deed conveying to him the whole tract, may grant the whole by a deed of bargain and sale, without entering on that part of which he is not in possession, notwithstanding an adverse possession by enclosures. (a)

(a) Approved in *Cresap vs. Hutson*, 9 Gill, 276, where it was held that the title to land draws to it the seisin, so that one who has title is, by virtue thereof, in possession until an ouster or disseisin is committed, and that the deed of a plaintiff in ejectment conveying the lands in dispute, made after the commencement of the suit, is not void because the defendant, at the time of the execution, held adverse possession of the land. See *Hoye vs. Swam*, 5 Md. 251; *Carroll vs. Norwood*, 5 H. & J. 155.

Where a grantor conveys land by name, and lays the same off by actual survey, excluding a part so conveyed, it will not control the operation of the deed to pass the whole. (b)

An attested copy of a deed not required by law to be enrolled, cannot be received in evidence, unless the original be lost, and possession of the land has been held under it for forty years. (c)

To constitute a deed of bargain and sale there must be a money consideration expressed therein. (d)

The Court are to decide, on inspection, whether or not a deed was indented, and the original must be produced for that purpose. (e)

A conveyance of land acknowledged by the grantor before two Justices of the Peace in a county in which he did not reside, and wherein the land is not situated, held to be inoperative. (f)

Parol evidence may be received to prove that a grantor, although stated in the deed to reside in a particular county, was a resident of the county in which the deed was acknowledged. (g)

The jury were directed to presume a valid deed had been executed, after a defective conveyance had been refused to be permitted to be given in evidence, there being evidence of possession by and under the grantee in the deed. (h)

The defendant cannot prove on the trial that the locations made on the plots in the cause were not in compliance with his instructions to the surveyor.

To prove a witness interested in the event of the suit, by holding land interfering with that in dispute, the land claimed by the witness must be located on the plots. (i)

A land commission under the Act of 1723, ch. 8, and depositions taken thereunder, not received in evidence, it not appearing that the *specific* notices required by that Act had been given. (k)

Where the plaintiff in ejectment locates his pretensions on the plots in two ways, and there is a general verdict and judgment thereon rendered, such judgment is void for uncertainty. (l)

(b) See *Hall vs. Gittings*, 2 H. & J. 119; *Bryan vs. Harvey*, 18 Md. 128.

(c) See *Coale vs. Harrington*, 7 H. & J. 147; *Budd vs. Brooke*, 3 G. 300; *Glenn vs. Davis*, 85 Md. 208.

(d) See *Cheney vs. Watkins*, *post*, m. p. 527.

(e) See Code, Art. 24, sec. 23; *Phelps vs. Phelps*, 17 Md. 120.

(f) In *Handy vs. State*, 7 H. & J. 50, it is said that the decision of the General Court, in the case in the text, was reversed on the ground that a deed which was read in evidence without objection, as a link in a chain of title to land, appeared to be defectively executed, and was not therefore legally admissible. The case in the text is also considered in *Johns vs. Rear-don*, 3 Md. Ch. 61-64. See *Hall vs. Gittings*, 2 H. & J. 380; *Grove vs. Todd*, 41 Md. 640.

(g) Approved in *Byer vs. Etnyre*, 2 G. 160. Cf. *Ramsburg vs. Campbell*, 55 Md. 231; *Webster vs. Hall*, 2 H. & McH. 19, *note*.

(h) Cf. *Cockey vs. Smith*, 3 H. & J. 20; *Bradford vs. McComas*, *Ib.* 450; *Beall vs. Lynn*, 6 H. & J. 336; *Garretson vs. Cole*, 2 H. & McH. 459, *note*.

(i) See *Chapline vs. Keedy*, 3 H. & McH. 578, *note*.

(k) See *Weems vs. Disney*, 4 H. & McH. 156, *note*.

(l) Cf. *Hughes vs. Howard*, 3 H. & J. 9; *Kershner vs. Kershner*, 36 Md. 336.

The Court of Appeals will take notice of testimony improperly admitted in evidence in the Court below, although it was not objected to and made no part of the question decided by the Court below.

The Court of Appeals will not give an opinion on any abstract proposition.

**EJECTMENT** for part of a tract of land called Hill's Forest, lying in Baltimore County. Defence on warrant, and plots returned.

1. The defendant at the trial, offered evidence to the jury to prove, that Walter Tolly was in the actual \* possession, by enclosure, of the land contained within the fence located on the plots, **15** claiming the same as his own, at the time James Bosley executed the deed to George Buchanan, of the 16th of June, 1784, for part of Hill's Forest, containing 431 acres more or less, it being the tract or parcel of land conveyed by Ogle and wife to the said Bosley; and that the said Bosley, in laying off the said land to the said Buchanan, laid the same down by actual survey with the said fence, excluding the possession of the said Tolly; and that the said Tolly, and the defendant claiming under him, continued the said possession by actual enclosure, during the whole time that the said Buchanan claimed the land called Hill's Forest, for which this ejectment is brought, and at the time the said Buchanan made the deed to the lessor of the plaintiff, (28th December, 1789,) and to the time of bringing the present ejectment.

The defendant prayed the opinion of the Court, and their direction to the jury, that if they find the above facts to be true, that then the said deeds (Bosley to Buchanan, and Buchanan to the lessor of the plaintiff,) cannot operate to convey any title to the land so enclosed, possessed, and claimed by the defendant.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.) The Court are of opinion, that as James Bosley was in possession of part of the land conveyed to him by Benjamin Ogle and wife, and George Buchanan was in possession of the same land conveyed by James Bosley to George Buchanan, it was not necessary for George Buchanan to enter on that part of the land contained within the enclosure of Walter Tolly, described above, at the time of making the said deed of bargain and sale from George Buchanan to the lessor of the plaintiff, in order to give it validity, and make it operate as such; and that Bosley's laying down the same land by actual survey, with the fence, excluding the possession of the said Tolly, cannot affect or control the operation of the said deeds, or affect their validity to pass the same land.

\* The Court refuse to give the direction to the jury as prayed by the counsel for the defendant. The defendant excepted. **16**

2. The plaintiff offered to read in evidence to the jury, to shew title to the land in the declaration of ejectment mentioned, the ex-

emplification of a deed from Henry Hill to Joseph Hill, in the following words, to wit:

"To all Christian people to whom these presents shall come, Henry Hill, of Anne Arundel County, in the Province of Maryland, sendeth greeting, &c. Know ye, that I the said Henry Hill, as well for and in consideration of the natural love and affection which I have and do bear unto my dear and well beloved son, Joseph Hill, of the county and province aforesaid, as also for divers other good causes and considerations me thereunto moving, have given, granted, made over and confirmed, and by these presents do give, grant, make over and confirm, unto my said son, Joseph Hill, his heirs and assigns forever, the several tracts or parcels of land following; that is to say, one tract or parcel of land situate, lying and being, in the fork of Gunpowder River, in Baltimore County, called and known by the name of Hill's Forest, and containing a thousand acres more or less; two other tracts or parcels of land situate, lying and being, on the north side of Little Choptank River, in Dorchester County, the one called Tench's Hope, containing two hundred acres, the other called Ragged Point, containing four hundred and forty acres, or thereabouts, be the same more or less. To have and to hold the said several parcels of land called Hill's Forest, Tench's Hope, and Ragged Point, with all and singular the premises, rights, profits, advantages, emoluments, and appurtenances, to the same belonging, or in any wise appertaining, unto him the said Joseph Hill, his heirs and assigns forever, to his and their only proper use and behoof forevermore; together with the full, free, quiet, and absolute possession of the same, to all ends and purposes whatsoever. In witness whereof I have \* here-  
**17** unto set my hand, and affixed my seal, this twenty-seventh day of July, seventeen hundred and thirty seven.

"Signed, sealed and delivered, HENRY HILL, (L. S.)"  
 in presence of

"John Brice, Geo. Steuart, Robert Gordon."

On the back of the foregoing deed was thus endorsed, viz. Maryland, *sc.* July 27, 1737. Then came the within mentioned Henry Hill, and acknowledged the within deed of gift, according to the direction of the Act of Assembly, before me, the subscriber, one of his lordship's justices of the Provincial Court. ROBERT GORDON.

July 29, 1737. Received of the within named Mr. Joseph Hill, for the use of the Right Honorable the Lord Baltimore, three pounds one shilling and eight pence, being for the alienation fines of the within mentioned lands.

Recorded July the 29th, 1737.

BENJA. TASKER.

Maryland, *sc.* I hereby certify that the foregoing is truly taken from Liber P. L. No. 8, folio 534, one of the land records of the late



Provincial Court, remaining in and belonging to the office of the General Court for the Western Shore.

In testimony whereof, to this exemplification,  
 (L. S.) (the same being first duly stamped,) I hereunto subscribe my name, and affix the seal of the said General Court, this seventeenth day of May, in the year of our Lord one thousand eight hundred. JOHN GWINN, Clk. Gen. Court W. S.

The defendant, by his counsel, objected to the reading the said exemplification in evidence to the jury.

CHASE, Ch. J. The Court are of opinion, that the copy of the deed from Henry Hill to Joseph Hill cannot be received as evidence, it not appearing by the copy to have the words This Indenture, and no money consideration being expressed in the deed, and therefore not a deed of bargain and sale.

\* The Court are to decide, on inspection, whether or not the deed was indented; and the original deed must be produced, **18** that the Court may determine whether or not the deed was indented.

The Court are also of opinion, that a copy from the record of a deed, which does not require enrolment, cannot be received in evidence; but that the deed itself must be produced as the best evidence.

If the original deed is lost, destroyed, or in possession of the adverse party, which must be proved to the Court, a copy is admissible in evidence, if proved to be a true copy by a person who has compared it with the original; and a copy from the record may be received in evidence if possession has gone accordingly for upwards of thirty-nine or forty years.

The plaintiff then offered in evidence to the jury, the entry on the old rent rolls as to the possession, and as to the time when a deed had been executed from Henry Hill to Joseph Hill, in these words, to wit:

"1,000 acres, 2l. yly. rent, Hill's Forest, sur. 4 Sept. 1683, for Ri. Hill, above ye head of Gunpowder river, on the So. side ye Nor. branch of ye said river, at a bounded red oak, and now belonging to Joseph Hill.

"1,000. Joseph Hill from Henry Hill, 27 July, 1737.

"True copy from the old rent roll of Baltimore County, page 424.

JNO. CALLAHAN."

The plaintiff also offered in evidence the will of Henry Hill, dated the 10th of February, 1738-9, in which, though his property is very particularly and specifically devised, there is no mention of Hill's Forest, and in which will there is no residuary devise. The plaintiff also offered in evidence, the charge of Hill's Forest on the Debt Books of the then Province of Maryland, as far back as the same can be found;

that is to say, to the year 1754, first to Joseph Hill during his life, and until 1761, when he died ; also Joseph Hill's will, dated the 20th of October, 1761, \* devising 200 acres, part of Hill's Forest, to Joseph

**19** Richardson, 200 acres, another part, to Nathaniel Richardson, and the residue thereof to Henry Margaret Hill, now Henry Margaret Ogle, his grand-daughter and heir at law ; also the charge in the said debt books in 1762, of Hill's Forest to Joseph Hill's heirs; also the further charge in the said debt books in 1771, of 200 acres, part of Hill's Forest, to Joseph Richardson ; 200 acres, another part thereof, to Nathaniel Richardson ; and 600 acres, another part thereof, to Mrs. Ogle above named ; also the regular conveyances to the present possessors of Hill's Forest from Joseph Hill, above named, through his three devisees above named ; that is to say, a deed stated to be dated on the 25th of June, 1777, and made by and between " Benjamin Ogle, Esquire, and Henry Margare this wife, of Anne, Arundel County in the State of Maryland, of the one part, and James Bosley, of Charles, of," &c. of the other part, for part of a tract of land called Hill's Forest, lying in Baltimore County, containing 431 acres ; which said deed was acknowledged by the grantors before two justices of the peace for Prince George's County, and it was certified by the clerk of Prince George's County Court, that the persons who appeared to have taken the said acknowledgments were, at the time, " justices of the peace for Prince George's County legally authorized and assigned"—and the said deed was recorded amongst the records of Baltimore County on the 20th of September, 1777 ; and a deed from the said James Bosley, of Charles, to George Buchanan, for the said land, dated the 16th of June, 1784 ; and a deed from Joseph Richardson, of Dorchester County, to Charles Wells, dated the 27th of March, 1779, for 200 acres, part of said tract called Hill's Forest, devised to the said Joseph Richardson by Joseph Hill. This deed was acknowledged before two justices of the peace for Dorchester County, and it was certified by the clerk of that County Court, that the persons who appeared to have taken the said acknowledgment

**20** were at the time " two of the justices of the peace in and for the \* County of Dorchester, duly commissioned and sworn ;" and was recorded amongst the records of Baltimore County on the 31st of July, 1779 ; and a deed from Charles Wells to George Buchanan, dated the 9th of October, 1784, for 200 acres of land, part of Hill's Forest, the land conveyed by the said Richardson to the said Wells ; and a deed from George Buchanan, to James Gittings, dated the 28th of December, 1789, for the last above mentioned part of Hill's Forest ; and a deed from the said Buchanan to the said Gittings, dated the said 28th of December, 1789, for the part of the said tract of land called Hill's Forest, which had been conveyed, as herein before mentioned, by Bosley to the said Buchanan. The plaintiff also offered proof that there has been actual possession of Hill's Forest, by living on the same, under the title of Joseph Hill above

named, ever since the year 1772; also proof that whilst it lay out in woods unoccupied, it was reputed to belong to a person of the name of Ogle, or to a person down the country; also the proof of Mr. John Thomas, aged 56 years and upwards, a person connected and well acquainted with the said Hill family, that in the said Hill family. Hill's Forest was always reputed to belong to the said Joseph Hill, and those claiming under him, and that he never heard that any other of the family claimed the same; that Henry Hill, the son of Doctor Richard Hill, who was brother of Joseph Hill, and heir at law of Henry Hill, father of the said Richard and Joseph, was frequently in this State from the year 1761 to the year 1792; that about the years 1769, 1770 or 1771, the said Henry Hill, Junior, spent the most of two years at the house of the said John Thomas in this State, in company with Mrs. Ogle above named, the then reputed owner of Hill's Forest; that Doctor Richard Hill, father of said Henry Hill, Junior, and son of Henry Hill, Senior, was born in this State, and that he came to this State in the year 1752, from the Island of Madeira, where he then resided, and stayed here amongst his relations, in and about the City of Annapolis, for the space of one year; that the  
 \* executors of the said Joseph Hill, and the said John Thomas **21**  
 as guardian of Mrs. Ogle, paid the quit rents on Hill's Forest, from the death of Joseph Hill until the marriage of Mrs. Ogle; also the proof that no person has held any part of Hill's Forest, claiming it as such, except those holding under the said Joseph Hill. There was no evidence that Richard Hill, the heir at law of his father Henry Hill, or that Henry Hill the heir at law of Richard Hill, or any other person, ever claimed a right to Hill's Forest, or any part thereof, except the said Joseph Hill, and those claiming under him; and no title being now set up by the defendant under the heirs of Henry Hill, father of the said Joseph Hill.

The defendant, by his counsel, offered in evidence to the jury, that the tract of land called Hill's Forest, for which the present ejectment is brought, was granted to Richard Hill on the 10th of August, 1684; and that the said Richard Hill left issue three sons, Richard, Joseph and Henry; that he made his last will and testament on the 20th of October, 1700, and therein devised the said tract of land to his three sons as tenants in common in fee; that the said Henry survived his two brothers, and became sole seised in fee of the said land as heir to the grantee; that the said Henry had issue two sons, Richard the eldest, and Joseph the youngest; that Richard removed to the Island of Madeira and resided there many years; that he was there alive in the year 1750, and afterwards died there, leaving Henry Hill, of Philadelphia, his son and heir at law; that the said last mentioned Henry Hill died in Philadelphia in the year 1798, a man of large fortune and without children, and that his heirs are sisters and the children of his deceased sisters. That the plaintiff to make title in this cause, having produced and offered to read in evi-

dence an exemplification from the records of the General Court of an instrument of writing from Henry Hill to his youngest son Joseph, bearing date the 27th of July 1737, which the Court refused to permit to be read to the jury in support of the title, the defendant,

**22** by his counsel, offered \* in evidence the before mentioned entry on the rent rolls in the land office referring to the date mentioned in the said exemplification, to account for the said entry being made on the said rent roll. The defendant further offered in evidence, that no actual possession or occupation of the land mentioned in the declaration of ejectment in this cause, nor of any part thereof, ever was at any time in any person claiming under Joseph Hill, in whom the lessor of the plaintiff sets up title; but that the whole of the said land was in woods and unoccupied until the year 1772, when James Bosley, under whom the lessor of the plaintiff claims, entered into a part thereof, and that the said Joseph Hill, nor any person claiming under him, ever made an entry on, or had the actual possession of any part of the land for which the defendant has taken defence upon the plots returned in this cause.

And the plaintiff, by his counsel, prayed the opinion of the Court, and their direction to the jury, that from the whole of the evidence above stated on the part of the plaintiff, they may and ought to presume that a deed good and operative in law to convey the said land called Hill's Forest, was executed, and did pass the said land in fee from the said Henry Hill, the son of the original patentee, to Joseph Hill his son.

CHASE, Ch. J. The Court are of opinion, and so direct the jury, in case they find the several facts stated by the plaintiff to be true, although they should find the several facts stated by the defendant to be true, that the same facts so stated by the plaintiff are sufficient for the jury to presume, and they ought to presume, that the said Henry Hill did make and execute a good and sufficient deed, valid and operative in law, to transfer and pass the said land called Hill's Forest from the said Henry Hill to the said Joseph Hill and his heirs. The defendant excepted.

3. The Plaintiff, by his counsel, offered to read in evidence to the jury a location of a tract of land called Holland's Park on the plots

**23** returned in this cause, as \* an act of the defendant evidencing the true location and position of the said tract called Holland's Park. The defendant, to show that the said location was not his act, offered to give in evidence to the jury his original instructions in writing to the surveyor as to laying down the said land; and the defendant offered to prove by the surveyor, that the location made and returned on the said plots, was made by misconception of the said instructions, and contrary to them.

CHASE, Ch. J. The Court are of opinion that the testimony offered on the part of the defendant is improper and cannot be received; and the Court refuse to let the said evidence so offered by the defendant go before the jury. The defendant excepted.

4. The Court in the course of the trial of this cause determined, that to prove a witness interested in the event, by holding land adjoining or interfering with the land in dispute, the land claimed or held by the witness must be located on the plots.

5. The Court also determined in this case, that a land commission, and deposition taken in virtue of it, under the Act of 1723, ch. 8, could not be received in evidence, unless it appeared by the certificate of the commissioners that the specific notices required by the Act had been given; and that as the certificate of the commissioners to the commission produced in this case, only mentioned that the notices, directed by the Act, had been given, it was defective, and did not entitle the party to read the commission and depositions in evidence.

Verdict for the plaintiff to the full extent of his locations upon the plots returned in this cause, and judgment for the plaintiff for possession of the land mentioned in the declaration of ejectment, agreeably to the finding of the jury, and costs.

The defendant brought a writ of error, and the record of proceedings was removed to the Court of Appeals. At November Term, 1802, the cause came on and was argued in that Court.

\* *Key, Harper and Johnson*, for Hall, the plaintiff in error, 24  
contended, 1. As to the first bill of exceptions, that the deed  
of bargain and sale from Buchanan to the lessor of the plaintiff for  
Hill's Forest, could not operate to convey that part of the said  
land which was in possession of Tolly by actual enclosures, without  
an actual entry having being made by Buchanan, (he being out of  
possession) upon the part under enclosures at the time of executing the  
said deed to the lessor of the plaintiff. The question, they said, was  
whether or not Buchanan had possession of the land when he exe-  
cuted the deed? if he had not, his deed would not operate to con-  
vey the part of which he was not possessed. That Bosley who sold  
to Buchanan, laid off the land to him, excluding Tolly's enclosure,  
in 1784, and Tolly, and those claiming under him, have been in pos-  
session ever since. Buchanan never was in possession of the part  
under enclosure; and although the land is included in Hill's Forest,  
yet as to that part under enclosure there has been a disseisin. As  
to what constitutes a disseisin, they cited *Co. Litt. s. 279*; and 1,  
*Burr. 107*. That a person disseised could not pass land by will nor  
convey without actual entry. 2 *Bac. Ab. 52*; *Shep. Touch. 242*; *Co.*  
*Litt. 15 a, 252 b*; *Run. Eject. 84, 85*. An actual possession is neces-  
sary to make a deed effectual. 2 *Blk. Com. 311, 314, 339*. 25  
And an actual entry must be made on the \* land to avoid

an adversary possession. *Mason vs. Smallwood*, 4 Har. & McHen. 484, and *McKeel vs. Woolford*, 4 Harr. & McHen. 495.

2. On the second bill of exceptions, they cited *Cowper*, 217.

3. They also objected to the verdict and judgment, and contended that the verdict was void for uncertainty. That the declaration in ejectment was for land by name and quantity, and not for land by description setting out the courses and distances. The plaintiff below located his pretensions on the plots in three different ways, and the jury, by their verdict, find generally for the plaintiff, without specifying which of the plaintiff's locations they adopted.

*Martin*, (Attorney-General,) and *Shaaff*, *contra*. 1. On the first exception. An entry into part of a tract of land, is an entry into the whole.—*Co. Litt.* 252 b. A seisin of parcel is a sufficient seisin in law for the whole. *Co. Litt.* 153. And where two are in possession the law will adjudge him in possession who hath right to have the possession. *Co. Litt.* 368 a; 2 *Blk. Com.* 332, 336, 375. As to what constitutes a disseisin, they cited also 1 *Burr.* 107, 123. 2. On the second exception, they contended that it was constantly the practice to produce feoffments in \* evidence on trials of ejectments, **26** which, with twenty years possession, were always considered as evidence of livery of seisin.

Upon the effect of the enrolment of deeds, and how far they are evidence, &c. they cited 15 *Vin. Ab.* 445, 444, pl. 2; 446, pl. 10; 2 *Lilly's P. R.* 69, 54; 2 *Vern.* 471; 1 *Ld. Ray.* 746; *Gilb. L. E.* 99, 100; *Bull. N. P.* 255; *Style*, 445; *Loft's Rep.* 766, and the Act of Assembly, 1785, ch. 46, s. 2.

3. As to the declaration, verdict and judgment, they said, it seemed to be admitted that the declaration was good; and as the judgment is according to the declaration, it must of course be a good judgment. The form is according to the British precedents.

The Court of Appeals, [(a) MACKALL, JONES, POTTS and DENNIS, J.] gave the following opinion:

The first bill of exceptions in this cause presents two questions for decision.

*First.* If James Bosley, who is stated to have been in the possession of the land called Hill's Forest, at the execution of his deed to George Buchanan, and \* George Buchanan having the same **27** possession of the land conveyed by James Bosley to him, had in construction of law, at the execution of their several deeds, such a possession of the whole, as entitled them to convey the same by deed of bargain and sale, notwithstanding the possession of Walter Tolly, by enclosures, during those periods, as stated in the same bill of exceptions? and

*Secondly.* If under such circumstances, the deeds of bargain and sale by them could operate to convey the whole of the tract to which

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(a) RUMSEY, Ch. J. owing to indisposition did not attend.

they were entitled, whether the operation of those deeds, or either of them, could be restricted or controlled by any evidence appearing in the record extrinsic of the deeds?

Upon these questions this Court concur with the General Court, and affirm the judgment expressed in that bill of exceptions.

The second bill of exceptions offers this question:

Whether the evidence given on the part of the plaintiff below, presented such a ground as justified the direction of the Court to the jury, that they might and ought to presume that a deed good and operative in law to convey the said land called Hill's Forest, was executed, and did pass the said land in fee from the said Henry Hill, the son of the original patentee, to Joseph Hill his son, although they should find the several facts stated by the defendant to be true?

Upon advertng to the record it appears to this Court, that a part of the evidence offered to the jury to prove the statement on which they were to ground the presumption of a good and operative deed from the said Henry Hill to Joseph Hill, was not admissible by law to be read to the jury, to wit: the deed from Benjamin Ogle and Henry Margaret his wife, to James Bosley, inasmuch as the same deed purports to have been executed by Benjamin Ogle and wife, of Anne Arundel County, and is acknowledged before two justices of the peace of Prince George's County, and from thence certified and transmitted to and recorded in Baltimore County, where the land lies.

• It was competent to James Gittings' lessee, at the trial, to have proved to the jury, that Benjamin Ogle and his wife, although stated in the deed to be of Anne Arundel County, were residents of Prince George's County, if that had been the fact. Having omitted to do that, and that fact making no part of the case stated in the bill of exceptions, the Court cannot go out of the record for evidence of that fact, or in any manner supply the omission. The Court are therefore of opinion, that the direction given was erroneous, because it appears that inadmissible evidence was read to the jury to support an important part of the statement, on which they were to ground the presumption of a deed from Henry Hill to Joseph Hill, which part of the statement, if struck out, does not leave such a case as will justify the judgment given in favor of the plaintiff in ejectment. The Court therefore disagree with the General Court in the direction stated in the second bill of exceptions to have been given, and reverse the judgment of the General Court on that bill of exceptions. 28

In the record another objection presents itself to the judgment rendered in the General Court. The uncertainty of the verdict found; that verdict not ascertaining, with sufficient precision, the location of the plaintiff's claim, and the particular land for which the jury find for the plaintiff.

The plaintiff hath made two locations of his pretensions; the jury do not say which of those locations they find to be the true location of the land; both of them cannot be right. The judgment of the Court does not ascertain it, and this Court can see nothing in the record to direct the General Court, or this Court, in giving their judgment that certainty required in judgments.

Much has been said respecting the exemplification of the deed from Henry Hill to Joseph Hill in 1737, offered in evidence by the plaintiff in ejectment, at the trial in the General Court: That exemplification, having been rejected by the General Court, and that rejection acquiesced in by the plaintiff there, it makes \* no part of the  
**29** record before this Court, and can only be considered as an abstract proposition, not in the cause at all, and on which this Court can judicially give no opinion.

As to the third bill of exceptions, this Court concur with the General Court, and affirm their judgment on that bill of exceptions.

Judgment of the General Court reversed, and *procedendo* awarded.

#### GENERAL COURT, MAY TERM, 1800.

##### HOGMIRE's Lessee *vs.* CHAPLINE.

The jury were directed, that if it appeared to them that the deed for the land, for which the ejectment was brought, from the defendant to the lessor of the plaintiff, for the consideration of 500*l.* was composed of money actually lent, a bond cancelled, &c. that then the deed was not usurious and void, although it should appear that a parol contract was made at the time of executing the deed to pay 9 per cent. interest on the said sum of 500*l.* But if it appeared that the money, said to be loaned, was not actually lent, but a less sum, so that the lessor was to receive by virtue of the said deed and bond, a sum for interest exceeding the rate of 6 per cent. per annum on the consideration expressed in the deed, that then the deed was usurious and void. (a)

EJECTMENT for a tract of land called Mount Pleasant, lying in Washington County. General defence, and issue joined.

The plaintiff at the trial produced and read in evidence to the jury, a patent granted to the defendant on the 15th of February, 1791, for the tract of land called Mount Pleasant, containing 2,575 acres. The plaintiff also produced and read in evidence, a deed executed by the defendant to the lessor of the plaintiff, on the 19th of April, 1794, whereby, in consideration of 500*l.* current money, the defendant conveyed to the lessor of the plaintiff, 200 acres of land, part of the said tract called Mount Pleasant.

The defendant offered in evidence to the jury, that the lessor of the plaintiff lent to the defendant the sum of 500*l.* current money,

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(a) See Rev. Code, Art. 36.



and that at the time of the loan, it was agreed by parol, between the lessor of the plaintiff and the defendant, that the lessor of the plaintiff should receive, and the defendant pay, at the rate of nine per cent. per annum on the money so loaned; and at the same time it was further agreed, that the defendant should execute to the lessor of the plaintiff, as an assurance, the deed under which the plaintiff makes title in this cause. The defendant further offered and read in evidence, a bond admitted to have been executed by the lessor of the plaintiff to the defendant, \* on the 1st of May, 1794, stating the loan of the said sum of 500*l.* by the lessor of the plaintiff **30** to the defendant, on the 12th of April, 1794, and the deed for the said 200 acres from the defendant to the lessor of the plaintiff, and that the defendant had agreed to pay unto the lessor of the plaintiff the said 500*l.* in gold and silver money, with legal interest thereon from the last mentioned day, on the 1st of October then next, and that if the money was then paid, that then the lessor of the plaintiff should convey and make over the same land to the defendant; but if the money was not paid at the time mentioned, then the said bond to be void.

The plaintiff further offered in evidence, that the said sum of 500*l.* consideration in the said deed, was composed of 436*l.* 5*s.* 4*d.* money lent, of 55*l.* 10*s.* 0*d.* due at that time on bond from the defendant to the lessor of the plaintiff, and which bond, in consideration, was given up, and of the further sum of 8*l.* 4*s.* 8*d.* at and before that time due by account from the defendant to the lessor of the plaintiff, for work and labor done by the lessor of the plaintiff, as a surveyor, for the defendant, and at his request.

Whereupon the defendant, by his counsel, prayed the opinion of the Court, and their direction to the jury, that if they believed, from the evidence offered, that the lessor of the plaintiff actually lent or advanced in the three sums stated, the sum of 500*l.* to the defendant, and at the time of the said loan or advance it was, by parol, mutually agreed between them, that the lessor of the plaintiff should receive, and the defendant pay, at the rate of nine per centum per annum interest on the said 500*l.* and that at the time of the said loan, or advance, it was agreed between the said lessor of the plaintiff and defendant, that the defendant should, by way of assurance, execute the deed aforesaid to the said lessor of the plaintiff, under which the plaintiff makes title, and did execute the same deed in pursuance of such agreement, that then the said deed is void.

\* CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.)

The Court are of opinion, that if it appears to the jury that the deed from the defendant to the lessor of the plaintiff, for the consideration of 500*l.* was composed or made up of 436*l.* 5*s.* 4*d.* money actually lent by the lessor of the plaintiff, to the defendant, a bond due from the defendant to the lessor of the plaintiff for 55*l.* 10*s.* 0*d.* **31**

cancelled or extinguished, and an account due from the defendant to the lessor of the plaintiff of 8*l.* 4*s.* 8*d.* for surveyor's work, that then the said deed was not usurious and is not void, although it should appear to the jury that a parol contract was made at the time of executing the said deed by the defendant to the lessor of the plaintiff to pay nine per cent. interest on the said sum of 500*l.*

The Court are also of opinion, that if it appears to the jury from the evidence, that the said sum of 436*l.* 5*s.* 4*d.* was not actually lent, but a less sum, so that the lessor of the plaintiff was to receive by virtue of the said deed and bond a sum of money for interest exceeding the rate of six per cent. per annum on the consideration expressed in the said deed, that then the same deed was usurious and is void.

The defendant excepted. Verdict and judgment for the plaintiff. *Mason*, for the plaintiff.

*Key* and *Shaaff*, for the defendant.

The defendant appealed to the Court of Appeals, and that Court at June Term, 1802, affirmed the judgment of the General Court.

#### GENERAL COURT, MAY TERM, 1800.

##### FISTER *vs.* BEALL'S Adm'rs.

A bill of sale of personal property of which the vendor retained the possession, if for a *bona fide* consideration, and duly executed, acknowledged and recorded, passed such property absolutely to the vendee; and the vendor is a competent witness to prove, that being in possession of the said property, he gamed the same away at cards.

An action of replevin does not abate by the death of the original plaintiff, but his administrator or executor may appear and prosecute it.

THIS was an action of replevin, instituted in Frederick County Court, and removed by appeal to this Court, on the part of the defendant in the Court below.

**32** \* The action was brought in the name of the appellees' intestate, in his life-time, for a gelding. The death of the plaintiff, in the Court below, was suggested, and his administrators permitted to appear and prosecute. *Non cepit* and property were pleaded. The general replication replied, and issues were joined.

The plaintiffs below, gave in evidence by one Perry Beall, that the horse for which this action was brought, was his property, and that being his property, he sold and conveyed him to Brooke Beall, the said plaintiffs' intestate, by deed dated the 10th of August, 1793; which deed duly executed, acknowledged and recorded, as the law directs, amongst the records of Montgomery County, in which county the said Perry Beall resided, was produced and read in evidence to the jury by the said plaintiffs, whereby the said Perry Beall, amongst other property therein mentioned, transferred, &c. "two horses," to

the said Brooke Beall. The plaintiffs also proved to the jury, by the said witness, that after the execution of the said deed, the said horse remained in the possession of the said Perry Beall, the witness, with the assent of the said Brooke Beall, until September, 1793, when the said witness rode the said horse to Frederick-Town, and gamed him away at cards with Nicholas Madera. The plaintiffs also proved by another witness, that the said horse came to the hands of Daniel Fister, the defendant, in the fall of the year 1793, by an exchange between him and one Peter Kile.

The defendant demurred to the evidence as above offered by the plaintiffs, as not being sufficient in law to maintain the issues joined. The plaintiffs joined in demurrer. And the County Court adjudged that the plaintiffs had shewn sufficient matter in evidence to maintain the issues joined, and judgment was rendered for the plaintiffs. To reverse which judgment the defendant appealed to this Court.

*Shaafl*, for appellant.

*Mason*, for the appellees.

The General Court reversed the judgment of the County Court, upon the ground, that being an \* action of replevin, it abated by the death of the original plaintiff, and that the administrators could not legally appear to prosecute such an action. 33

The appellees appealed to the Court of Appeals.

The Court of Appeals, at November Term, 1802, reversed the judgment of the General Court, and affirmed the judgment of the County Court.

## COURT OF APPEALS, JUNE TERM, 1800.

### OWINGS vs. GOODWIN.

Where an action is brought on a bond with a collateral condition, and the defendant pleads general performance, to which the plaintiff replies, and the defendant being ruled to rejoin makes default, can a judgment be entered for the penalty of the bond without executing a writ of inquiry to ascertain the damages sustained? (a)

**ERROR** to the General Court. It was an action of debt upon a writing obligatory, dated the 15th of November, 1785, in the penalty of 4,000*l.* current money, conditioned that Owings, (the plaintiff in error,) should convey and make over, by a good and sufficient instrument of writing, on or before the 1st of November, 1786, the quantity of 4,000 acres of patented pre-emption land, situate and lying in the Kentucky settlement, and Commonwealth of Virginia, according to the laws of the said commonwealth, unto Goodwin, (the defendant

(a) But see *Wilmer vs. Harris*, 5 H. & J. 1; *Evans' Prac.* 433; *Alex. Br. Stat.* 609.

in error,) and to a certain Thomas Russell, deceased, whom the said Goodwin survived, their heirs and assigns, for ever, as tenants in common. The defendant in the Court below, pleaded general performance; and the plaintiff replied, that the defendant did not convey and make over, by a good and sufficient instrument of writing, on or before, &c. the said land unto the plaintiff and Russell, &c. The defendant was ruled to rejoin to the plaintiff's replication, and omitting to do so, a judgment was rendered against him by default, under the rule, at May Term 1795, for the penalty of the bond and costs. The defendant afterwards, on the 20th of December, 1797, prosecuted a writ of error, returnable to this Court.

*Ridgely, Hollingsworth and Mason*, for the plaintiff in error.

**34** \* *Martin*, (Attorney-General,) for the defendant in error, cited 2 *Blk. Com.* 340, 405; 4 & 5 *Ann. c.* 16, s. 12; 8 & 9 *W. III*, c. 11, s. 8; 1 *Ray*. 439.

The Court of Appeals, at this term, affirmed the judgment *nisi*, and the plaintiff in error, on the 26th of January, 1801, obtained an injunction from the Court of Chancery to stay proceedings on the same.

## COURT OF APPEALS, JUNE TERM, 1800.

### QUYNN *vs.* THE STATE, use of PUE *et al.*

The surety on a collector's bond is not answerable for a sum of money directed by an Act of Assembly to be levied at a particular time, which was not so levied. And, although the defendant had in the Court below withdrawn his plea and confessed judgment, such judgment will be reversed on writ of error. (a)

An appeal lies from a judgment rendered by confession. (b)

(a) In *Young vs. State*, 7 G. & J. 262, this is said to be one of the cases where the liability sought to be enforced was not covered by the bond whereon the suit was prosecuted. As to the liability of the sureties on a collector's bond. see *Ellicott vs. Levy Court*, *post*, m. p. 359, *note*.

(b) In *Bank vs. McClellan*, 1 Md. Ch. 330, the Chancellor says that in *Quynn vs. State*, a judgment by confession was taken by writ of error to the Court of Appeals, and was there reversed; that the practice has been very general and of long standing to take before the Appellate Court, judgments and decrees by confession and by default; and that the only question ever made upon the subject of the right of appeal has had reference. not to the proceedings which led to the decision appealed from, but to the character of the decision itself—that is, whether it settled the question of right between the parties. If it did, the appeal has been entertained, no matter whether the decision was adverse, or by consent or default. But in *Williams vs. Williams*, 7 G. 302, it was held that an appeal would not lie from a decree which, upon its face, appeared to have been made by the consent of the parties. And in *Morgan vs. Briscoe*, 4 Md. 272, where there was an appeal from a judgment rendered by confession, and the appellant asked for its reversal

ERROR to the General Court. The present was an action of debt brought by the defendant in error, who was plaintiff below, against the plaintiff in error, \* upon a writing obligatory dated the 17th of December, 1793, executed by William Goldsmith, as collector of the county charges for Anne Arundel County, with Allen Quynn, (the plaintiff in error,) and others as his sureties, to the State of Maryland, with a condition in these words: "That if the above bound William Goldsmith shall well and faithfully execute his office, and the several duties required of him by law, and shall well and truly account for and pay to the justices of Anne Arundel County Court, or their order, the several sums of money which he shall receive, or be answerable for by law, at such time as the law shall direct, then the above obligation to be void." The defendant in the Court below pleaded general performance, to which the plaintiff replied the replication in 2 *Harris' Entries*, 456, stating that by an Act of Assembly passed at November Session, 1791, ch. 53, entitled, "An Act to lay out certain roads in Anne Arundel and Montgomery Counties," it was, amongst other things enacted, that one road through, &c. should be laid out, &c. and that Michael Pue, John Snowden and Caleb Dorsey, were thereby appointed commissioners to lay out, &c. the same road, who accepted the said trust. That by the said Act it was further enacted, that the justices of the peace of Anne Arundel County, at their Levy Court to be held next after the first of January, and thereafter in the last Court of the year annually, should levy a sum of money not exceeding two shillings and six pence current money on every one hundred pounds worth of assessable property in the said county, to be collected in the same manner, at the same times, and by the same persons, as other county taxes are collected, and should be paid quarter-yearly into the hands of the said commissioners, until the said road should be completed. That after the passage of the said Act, and before the making the said writing obligatory, at a Levy Court held next after the said first of January in the said Act mentioned, to wit, at a Levy Court held at the City of Annapolis, in and for Anne Arundel County aforesaid, on the twenty-sixth day of November, in the \* year 1793, there was assessed and levied to the said commissioners for laying out the road through Anne Arundel County aforesaid, by the

because the bill obligatory filed as the cause of action, was not stamped as required by the Act of Assembly, and because there was no declaration filed, the Court said that the appellant would be entitled to a reversal were it not for the provisions of the Act of 1825, c. 117, (Code, Art. 5, s. 12.) By that Act the appellant was prohibited from insisting upon any point which was not brought before the Court below, &c. This provision does not apply to motions in arrest of judgment, but the motion must be made before the Court of Appeals can examine the judgment. See *Ringgold's Case*, 1 Bl. 12; *Ward vs. Hollins*, 14 Md. 158; *Montgomery vs. Murphy*, 19 Md. 579; *Huston vs. Ditto*, 20 Md. 326; *Anders vs. Devries*, 26 Md. 222; *Johns vs. Fitchey*, 39 Md. 258.

justices of the peace for the said county, the sum of, &c. to be collected from assessable property in the said county, and to be paid to the said commissioners pursuant to the directions of the said Act. That the said William Goldsmith in the writing obligatory mentioned, was duly authorized and appointed to collect the assessments and county taxes, &c. had notice &c. did collect, &c. and refused to pay &c. The defendant by his rejoinder, protesting that the assessment was not imposed—that the said Goldsmith did not collect and receive the said sum of, &c. rejoined payment. The defendant afterwards entered a *relicta verificatione*, and confessed judgment for the penalty of the bond, and costs, to be released on payment of, &c. from which judgment the cause was brought, by writ of error, to this Court.

*Shaafl*, for the plaintiff in error. There are but two questions necessary to be considered in this case.

*First*. Whether the defendant in error has a cause of action, admitting the pleadings to stand? And

*Secondly*. What is the effect of the *relicta verificatione*, and judgment by confession?

1. As to the first. The Act of Assembly of 1791, ch. 53, s. 3, directed, “that the justices of the peace of Anne Arundel County, at their Levy Court to be held next after the first of January next, and thereafter in the last Court of the year annually, should levy a sum of money not exceeding,” &c. The replication states, that the Levy Court met on the 26th of November, and made the assessment and levy in question. We answer, that such levy was not made by a Levy Court authorized by law to make it. The Act of Assembly of October, 1780, ch. 26, s. 1, directs that the justices of the several County Courts, in Court sitting, shall, at their respective June or August Courts, adjust the ordinary and necessary expenses of their several counties. The Act prescribes also the form of the bond to be given by the collectors.

**39** \* By the Act of 1790, ch. 33, s. 2, the justices of the peace are directed to meet and lay the assessment as heretofore. The Act of 1791, ch. 61, s. 2, does not change the time of laying the levy as it was established by the aforesaid Act of 1780, ch. 26. It only authorizes the Courts to adjourn to the fourth Tuesday of November in each year, for the sole purpose of settling the accounts of the inspectors of tobacco. If the levy was laid at an adjourned Court, it ought to have been at the August Term, and should have been so stated in the replication; but if the Court in November was not an adjourned Court, then was the levy improperly made, because there is no Act of Assembly authorizing it to be made at such a Court. If on the other hand, it was an adjourned Court, then also was the levy illegally laid, because the adjournment gives no other power than that of settling with tobacco inspectors. This is like the cases of

the Courts taking sheriffs' bonds, and calling Courts for that purpose. If the Court is stated to have been held at an improper time, it will be fatal. Here Goldsmith was made the collector of taxes to be collected in 1793. This tax could not be collected in 1793. If then he was not bound to collect, the surety is not answerable. A man may, to be sure, as far as relates to himself, undertake to perform a thing, which he is not *ex officio* bound to perform; and he may make himself answerable by such undertaking, but he cannot thereby affect a person who is only bound for the performance of such man's official duties. *Johnson et al. vs. The State*, 3 *Harr. & McHen.* 223.

2. What is the effect of the *relicta verificatione*, and judgment by confession? The judgment may be made to the replication, and the *relicta* to the rejoinder. A replication, in an action on a bond like the present, is necessary, to show what it is the plaintiff demands for the breach of the condition; and if it appears in this case, by his own showing, that he has no right to recover, the judgment must be reversed. If there had been no replication here, then this judgment would be similar to one by confession in an action wherein there was no declaration; and many cases may be referred to where judgments of that kind have been reversed. 3 *Harr. & McHen.* 389, 408; 4 *Harr. & McHen.* 351.

*Ridgely*, on the same side. \* From an examination of the Acts of Assembly, it is manifest that the Levy Court were 41 not authorized to make the assessment under consideration, in November, the time they did make it. Where an authority is special, it must be strictly pursued. 1 *Salk.* 475. And where such authority is created by statute, it must also be strictly pursued. *Cowp.* 26, 29; 4 *Bac.* 656; 3 *Blk. Com.* 407. Consent to confess judgment on terms does not imply consent to bring no writ of error. 2 *W. Blk. Rep.* 780. The confession of judgment does not put the defendant in a worse situation than he would have been in if a verdict had been found against him. Where it appears from the whole record that the plaintiff has no cause of action, he shall never have judgment. 1 *Salk.* 365; 3 *Blk. Com.* 394; 2 *Burr.* 927; *Bull. N. P.* 253; *Bull. N. P.* 249; *Esp.* 769; 1 *Com. Dig.* 244; 5 *Com. Dig.* 49.

*Cooke, Mason and Harper*, for the defendant in error.

*Ridgely* and *Martin* (Attorney-General,) also for the plaintiff in error. The Court of Appeals, at this term, reversed the judgment of the Court below.

## COURT OF APPEALS, JUNE TERM, 1800.

LAMOTT *et al.* vs. STERETT.

A lessor is entitled to rent of the premises, although during the term the houses, &c. had been destroyed by fire, and notwithstanding the lessor,

immediately after the fire, took possession of sundry articles, &c. and entered upon the premises, of which he made various uses. (a)

If a sum of money is paid in part of a debt due on bond, &c. carrying interest, before the expiration of the year, such payment is to be deducted from the interest then due, and the residue, if any, from the principal; and the balance thus ascertained, decreed to be paid *with interest thereon* until paid. (b)

APPEAL from the Court of Chancery. The case appears to be correctly stated by the counsel.

*Winchester*, for the appellants. The appellants leased from the appellee a brewery with its appurtenances, which, during the term, was destroyed by fire. The rents were fully paid up to the period of the destruction of the property. An action of covenant was brought at law by the appellee, to recover rent arising after the fire, in which action he obtained judgment. The bill in Chancery in this case, filed by the present appellants, prayed for relief against that judgment, and by the examination taken, it was fully proved that the appellee, immediately after the fire, took possession of sundry brewing utensils not consumed, and also entered upon the lot, of which he made various uses. These facts were not examinable at law from the nature of the pleadings. The Chancellor directed an account to be stated between the parties, in which the right of the appellee to rent, after the destruction of the property, was acknowledged; and the appellants were also charged with interest. That account was confirmed by final decree. The appellants complain of that decree, and humbly insist that it ought to be reversed, and that relief should be granted them against the judgment at law. It is admitted, that an express covenant retains its \*obligation at law, notwithstanding the house or thing to which it relates is burnt. 2 *Ld. Raym.* 1477. But it is denied that such obligation extends to the full amount of the rent reserved by the covenant even at law, and that under the circumstances of this case, its obligation ceases at law and in equity. By no act of the party, himself covenanting, can his covenant be destroyed; yet a man may be discharged from his contract or agreement by the act of God; for when a thing is prescribed to be done, or omitted, if the performance becomes physically impossible, the person obliged shall receive no prejudice, because it would be unreasonable that those things which are inevitable, which no industry can avoid, or policy prevent, should be construed to produce an injury. 10 *Mod.*

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(a) In *Buschman vs. Wilson*, 29 Md. 553, it was ruled that where the lease contains a stipulation that the rent shall cease if the demised premises are burned down, the happening of the contingency determines the lease, and the lessee should thereupon surrender the premises.

(b) Cf. *Gwinn vs. Whittaker*, *post*, m. p. 752.



268; *Noy's Maxims*, 35. \* And there is no difference in this respect between a covenant and an assumpsit. *Palmer*, 548; *Plowd.* 71; 2 *Blk. Com.* 41; 1 *Roll. Ab.* 454, *pl.* 8; *Esp.* 169; *Bull. N. P.* 156; 2 *Wils.* 295. If these authorities, as they clearly do, prove, \* that on general principles of law, the case of the appellants 44 has been decided by the harshest rule, and that it ought to have received a different adjudication, it will not be contended that Chancery was not, and that this Court is not, competent to grant full relief. By a demise of property, the lessor so far parts with the control of it during the term, that any entry without the lessee's assent is punishable as a trespass. If the lessor enters, though not with such circumstances as amount to an eviction, yet if his entry interrupts the lessee's enjoyment, it will destroy the claim for rent during the period of such interruption. If the property demised to the appellants had not been burnt, but the appellee had entered and removed the stills, &c. or the other materials for the brewery, there can be no doubt that the rent would have been suspended. If the obligation to pay rent remained after the destruction of the brewery, the brewery being the principal consideration for the covenant, the appellants were at least entitled to the use and enjoyment of the unconsumed materials, and to the possession of the lot. But the appellee, by his entry and acts, deprived the appellants of that use, enjoyment and possession, and therefore it would seem in justice to follow, deprived himself of the rent. *Coup.* 242; 1 *Roll. Ab.* 236; *Cas. temp. Talb.* 2; 1 *Cha. Rep.* 97; 2 *P. Wms.* 163. And it having been allowed by the Chancellor, his decree, for that reason alone, should be reversed.

*Cooke*, on the same side. It is contended on the part of the appellants, that the entry and use of the demised premises by the appellee, barred all further claim for rent. The law is well settled, that the re-entry of the lessor will bar the accruing rent, and upon this part of the case, it is believed by the appellants, that considering the hardship of making them, as lessees, pay for property they could not enjoy, there is sufficient evidence to authorize the application of that rule here. But if the Court should think otherwise with respect to the use and occupation of the ground, still as to the utensils of the brewery, it is impossible there can be any doubt. These made as much a part of the consideration for which the rent was to be paid, as did the buildings. They were expressly included in the lease, and it is idle to suppose, that either law or equity would authorize the lessor to sell such utensils, before the lease was half \* expired, and receive payment for them, and then to recover rent from 46 the lessees for the same articles for the remainder of the term. If the law is, as we conceive it to be, that the entry and eviction of part of the demised premises will bar the recovery of any part of the rent, surely here is an entry and an eviction, and sale too, of part of the thing, for the use of which the rent was agreed to be paid, and con-

sequently the subsequent rent was not recoverable. It may be said, that this entry and sale were made with the consent and approbation of the lessees, as the sale was made to themselves; but if the law would have been as we state it, had the sale been to a stranger, we cannot see how the case is altered by its being made to the lessees. The truth is, that at that period neither the lessor nor lessees thought any future rent could be recovered. But is it equitable that the lessor should have a double compensation for the same thing; that he should receive the proceeds of the things rented, when sold, and rent for their use, when by the sale he had put a stop to such use? Upon his own principles the rent ought to be apportioned in equity, but by the act of the party it cannot here be done, and therefore it must be lost. See *Cowp.* 242; 1 *Ld. Raym.* 77.

*Smith*, on the same side. The interest account, as stated, by the auditor, appears to be erroneous. If a partial payment be made a year after the money was due, it can with propriety be applied to the interest, and the balance ought then to be struck, because at that time interest was due. But if such payment should be made before the expiration of the year, it ought not to be applied immediately to the interest, because there was no interest then due, and the balance ought not to be struck until the expiration of the year; at the end of the year the interest upon the principal debt, and the interest upon the money paid from the day of payment, ought to

be computed, and \* the balance ought then to be struck. Upon  
 48 the principle of the auditor, the creditor would receive more than six per cent. per annum; for if a debtor, having to pay interest of \$2,000 per annum, should, at the end of six months, pay \$1,000, and that payment should be applied immediately to the interest, and the balance should then be struck, the creditor would in such case receive, in addition to the six per cent. per annum, the interest of the \$1,000 paid for six months, viz. \$30, and the debtor would lose such \$30. If instead of \$1,000 the debtor should pay only \$500 at the end of six months, upon striking the balance then, there would be \$500 of interest in such balance, upon which interest would thereafter be computed; and thus there would be interest upon interest. In such a case, the debtor by paying the \$500, instead of benefiting, would injure himself; because he would not only deprive himself of the use or interest for six months of the \$500 paid, but he would create an additional principal of \$500, upon which interest would thereafter accrue; and so *totiis quotiis*.

*Martin*, (Attorney-General,) for the appellee.

The Court of Appeals, at this term, affirmed the decree of the Court of Chancery.

COURT OF APPEALS, JUNE TERM, 1800.

PEARCE *et al.* vs. WALLACE and MUIR.

A bond delivered to a creditor to be collected, and the amount applied to the discharge of so much of the debt due to him, is not to be credited as a payment, unless the money is received; and there is no *laches* on the part of the creditor, unless the bond is assigned to him, or he has express directions to proceed to recover the money.

The changing of a sterling money debt into currency, at 170 exchange, is equitable and proper.

When a sterling money debt is changed into currency, 6 per cent interest is to be allowed.

A draft for sterling money is to be credited at the rate of exchange at the time of the draft.

APPEAL from a decree of the Court of Chancery dismissing the bill. The bill states, that on the 29th of September, 1785, the complainants, (the present appellants,) entered into a bond to the defendants, in the penal sum of 5,600*l.* sterling money, conditioned for the payment of the balance due to the house of \* Wallace, John-  
son and Muir, merchants in London, for goods had of them 49  
by John Voorhees & Co. in the year 1784; that the complainants, on the 29th of September, 1785, entered into another bond to the defendants, in the penal sum of 7,000*l.* sterling money, conditioned for the payment of whatever might be the amount of the goods and charges on them which John Voorhees & Co. had of the said house of W. J. & M. in the said year 1785, which said last mentioned goods were to be paid for agreeably to a contract entered into between the said house and the said John Voorhees & Co. That suits have been brought upon the said bonds, and judgments entered against the complainants for the penalties thereof, without specifying the sums for which the judgments should be released. That on the 4th of October, 1787, John Voorhees, on account of John Voorhees & Co. assigned unto the defendants a bond of a certain Daniel Charles Heath, on which bond there was due from the said Heath to the said Voorhees, at the time of the assignment, the sum of 357*l.* 9*s.* 9*d.* current money, which sum the defendants have not credited the account of the said Voorhees & Co. though the defendants have ever since the assignment held, and still do retain the said bond. That in the account of the defendants against the said Voorhees & Co. they have charged the exchange at 70*l.* on the 100*l.* when it ought, agreeably to the custom and usage among merchants, to have been charged at 66*l.* 13*s.* 4*d.* on the 100*l.* sterling. That the defendants have charged the said Voorhees & Co. six per cent. interest on the money due them on the goods purchased for them, when by a stipulated agreement in writing between the defendants and James Pearce, they were to

charge only five per cent. interest in any sum which might remain unpaid at the expiration of the term of credit obtained from the tradesmen. That very considerable payments have been made on each of the said judgments, and the defendants claim a balance due them on the 20th of November, 1792, of 2,339*l.* 13*s.* 3*d.* with interest

**50** from that day, when agreeably to the \* complainants' accounts, there is not due 1,000*l.* current money. It concludes with a prayer for general relief, and for an injunction, &c.

The agreement above referred to in the bill, as having been entered into by James Pearce, one of the partners of John Voorhees & Co. with the defendants, is "that the goods ordered by Mr. Pearce are to be purchased for him by Wallace, Johnson and Muir, of London, on a commission of 5 per cent. and are to be laid in for him on the best terms they can be had for, on the usual credit, for which goods he is to pay in 12 months from the date of the invoice, in cash or good bills of exchange. He is to be allowed 5 per cent. per annum interest, on any sum he may place in the hands of the house of W. J. & M. before his goods become due, and he is to pay 5 per cent. per annum interest on any sum which may remain unpaid at the expiration of the term of credit obtained from the tradesmen. He is to be credited with all drawbacks and debentures which may be allowed."

The answers of the defendants admit the agreement, referred to by the bill, respecting interest at the rate of 5 per cent. per annum, but they expressly allege, that the reason of that agreement was founded upon the idea, well understood at the time it was made by the said Pearce and the defendants, that the debt so to be contracted by the said Voorhees & Co. was to be contracted with the house of W. J. & M. in London, and the payments thereof to be made to the said house in London. And they further allege, that the exchange between America and London is generally much higher than sixty-six and two-thirds per centum, and seldom so low as 170*l.* currency for 100*l.* sterling. They also allege, that it is much more convenient and advantageous to a debtor to have the privilege of paying his debt in this country, than to be compelled to remit his payments to London, by which great delay, and often great loss is sustained. And that antecedent to an agreement between the said Voorhees and the defendants, and to the stating of the account hereinafter more particularly mentioned, in \* pursuance and in consequence thereof, if the said

**51** Voorhees & Co. had made any payments of bills of exchange to the defendants, the same would have been remitted to London, and would not have been passed to their credit until paid in London; and if they had made payments in current money to the defendants, the same would have been credited in their accounts in London, three months after said payments, (that period being allowed for the passage and sight of bills,) at the exchange, at which bills of exchange might be purchased here at the time of such respective payments in current money, and so the said Voorhees & Co. well knew the said

payments were to be received by the defendants and to be thus credited in their account with W. J. & M. of London. And they further allege, that if such current money payments were to be credited in sterling, at the time they were respectively made, at the rate of 166*l.* 13*s.* 4*d.* current money for 100*l.* sterling, they would lose more than their whole commission for buying and shipping the said goods, and transacting the business, as by a particular account of the rates of exchange at the periods of such respective payments, herewith filed, will appear. That to avoid the delay and risk of remitting the payments to London, and also to avoid the difficulty of procuring bills of exchange to make said remittances, which the said Voorhees & Co. were from their situation at Georgetown, in Kent County, obliged to resort to Annapolis, Baltimore or Philadelphia, to purchase, and finding the prices of bills, particularly at Philadelphia, usually higher than the prices demanded by the defendants, the said Voorhees & Co. repeatedly applied to them, after they had contracted the said sterling money debt, payable in London, to turn the said sterling money debt, so contracted in London, into current money, and that they the said Voorhees & Co. might be permitted to make payments of the same to the defendants, who then resided, and still reside in Annapolis, or to some person for their use in Philadelphia, or Chestertown in Kent County, which they the said \* Voorhees & Co. represented as suiting them still better than **52** making payments in Annapolis, and which they also stated would facilitate them in making large and speedy payments; and that with a view to accommodate the said Voorhees & Co. and not with a view of profit, the defendants did consent to change the said sterling debt into current money, and to give the said Voorhees & Co. the advantage of making the payments to them in the current money of this State. That in pursuance of the said agreement, the said Voorhees did pay sundry sums of current money to R. T. of Chestertown, in Kent County, for the use of the defendants, and did also, in pursuance thereof, pass sundry bills or notes, &c. &c. and that afterwards, on the 25th of August, 1789, the defendants, and the said Voorhees, on behalf of himself and his partner, accounted together in current money of and concerning the debt so contracted by them with the house of W. J. & M. of London; and of the sundry payments then made in discharge of the same, and upon such account the said Voorhees & Co. were found in error and indebted to the said W. J. & M. in the sum of 7,033*l.* 11*s.* 10*d.* current money, which account, and the balance so struck, the said Voorhees, on behalf of himself and company, then and there admitted to be justly and truly stated, and the said balance to be due to the said W. J. & M. That in the said account there is a charge of 6,803*l.* 11*s.* 4*d.* sterling money, which is extended in currency at 70 per cent. exchange, and the same was so done, because the said sterling money was then due and payable in London; that bills of exchange were then at seventy-two and one-

half per cent. and if the said Voorhees & Co. had made their payment of the said sterling debt in London, the same could not then, and could not now be paid, and when paid, the defendants believe they shall not be able to remit at 70 per cent. and that the said sterling was so turned into currency at the said exchange of 70 per cent. with the consent and approbation of the said Voorhees. The defendants admit that they have charged the said Voorhees & Co. interest

**53** at the rate of six per cent. \* per annum, which they apprehend, and are advised they are well justified in claiming, inasmuch as the said debt due from the said Voorhees & Co. by their solicitation and consent, has been made a current money debt, and payable in this State, to the defendants, for the ease and convenience of the said debtors, and as the defendants have also taken upon themselves the trouble and risk of remitting the same to London, the said debt, since the nature of it has been thus changed, ought to bear the legal interest of this State where the change was made, and where the said debt has, by such change become payable. That they considered the agreement to pay 5 per cent. wholly annulled and done away from the time they agreed to change the said sterling debt, payable in London, into a current money debt payable in this State. That in the account stated and signed as aforesaid, 6 per cent. interest is calculated, which was examined, &c. by the said Voorhees, and by him admitted, &c. They admit that the bond of D. C. Heath, &c. was lodged with them, and that Voorhees & Co. has not been credited therefor, because they deny it was received as a payment—that it was never legally assigned to them, but put into their hands to collect, and when received to be credited. That when requested by Voorhees & Co. so to do, by letter, suit was commenced, and the writs renewed to several Courts, but that Heath was never arrested, and the suit was discontinued by the counsel employed by the defendants, they finding it fruitless and expensive to renew the same. That the account above stated to have been settled and signed by the said Voorhees, was long after the said bond was lodged for collection as aforesaid, and the said Voorhees, if he had supposed the same was delivered as a payment, would have insisted on its being credited, &c.

The case thus depending on the bill, answers and exhibits, the parties entered into the following agreement, viz. "The Chancellor, it is agreed, shall by an interlocutory order, direct the auditor to state the account between the parties upon the following points:

1st. The debt of Heath, if it is to be credited or not.

**54** \* 2d. Upon the changing of the debt from sterling into currency at 70 per cent. exchange.

3d. Upon charging six per cent. instead of 5 per cent. which the complainants insist on.

4th. The charging interest on money three months after the payment is made.

5th. At what rate of exchange a sterling debt, credited on the 14th of May, 1790, ought to be extended in current money.

It is submitted, whether there ought to be a discrimination between the cases of the principals and the securities." [Some of the complainants were the securities in the bonds executed by Voorhees & Co. to the defendants herein first stated.]

HANSON, Chancellor, (February 8, 1796,) being connected with one of the defendants, conceived it improper for him to decide this cause. He therefore requested Philip Barton Key, Esquire, (one of the solicitors of the said Court,) to examine the papers in the cause, to consider the arguments of the counsel, which were filed in writing, and to give him thereon his opinion in writing.

Mr. Key afterwards delivered in writing his opinion as follows, to wit :

"In compliance with the request of the Chancellor, I have examined the bill, answer and exhibits, filed in case of *Pearce & others vs. Wallace & Muir*, and the observations of counsel on each side, and I am of opinion, on the five points submitted as the grounds of an interlocutory order, to direct the auditor in stating the account,

1st. That Heath's bond ought not to be credited as a payment, and that the same should be re-delivered to the complainants.

2dly. That the change of the sterling debt into currency at 170 exchange, is equitable and proper. I not only think so, because Voorhees, the acting partner, has signed a stated account without objecting to such extension, but because there is proof to shew that it is rather below the rate of exchange at the time the debt ought to have been paid. If therefore the complainants \*sought indulgence, it ought not to be at the expense of the defendants. 55

If the complainants had been at that time in possession of specie to discharge the debt, would it not have taken 170*l.* current money to have purchased bills to have discharged 100*l.* sterling in London? If so, and such is the proof adduced, they ought not to complain. My ideas on this case are founded on a conviction that it originally was the clear intent of all parties, that Voorhees & Co. were to pay W. J. & M. in London, for the goods shipped to them. This appears to me evident from all the transactions between them, and the subsequent change was, with the consent and approbation of the parties, intended as an ease and accommodation to Voorhees & Co. In the course of my practice, I have always thus extended a sterling debt at the current rate of exchange, when I have taken a security for it. I know it to be the practice of W. J. & M. and I believe it to be the usage of trade. If it is not so, merchants in London, who ship goods to this country on credit, must be ruined; for if exchange is low, the debtor buys bills, and ships to a profit; if it is high, he pays money at sixty-six and two-thirds to a factor or partner here, who must either lay out the money in bills to remit at a great loss, or keep the

money till bills fall, and thus loose the interest and risk his credit. To prevent this the shipper is induced to make the debt payable in London, in which event he never risks the exchange, but receives the sterling amount in London. I therefore think the change of the debt from sterling into current money, at 170*l.* reasonable and proper, it being with the consent, and for the ease and accommodation of Voorhees & Co.

3dly. That the auditor should charge an interest of six per cent. from the date of the change of the debt into current money, as then the complainants had the privilege of paying the debt in this country. Upon the ground of the original contract, only five per cent. interest could be charged, because the debt was contracted in England to be paid in London. The facts are simply these—W. & M.

**56** of Maryland, of the house \* of W. J. & M. of London, undertook for a commission, that their London house should ship a certain amount of goods to Voorhees & Co. which they W. J. & M. must take up of the manufacturers in England on a certain credit, and if they fail in punctual payment, with an interest of five per cent. Voorhees & Co. were to have 12 months credit, and to pay five per cent. if not punctual; that is, they were to have the goods on the terms that W. J. & M. took them up, and to give a certain commission for buying and shipping them which was the only profit W. J. & M. were to have for the risk they incurred, and delay of payment. A subsequent contract entered into with W. & M. of Maryland, permitted Voorhees & Co. to pay off the debt due W. J. & M. of London, to W. & M. of Maryland, in this country; and in virtue of this subsequent contract upon principles of equity and justice, I think they ought to pay six per cent. from that time; because the contract or permission to pay in this country, with an interest of six per cent. was more beneficial to them, than to pay the debt in London with an interest but of five per cent. By the custom of trade, remittances to London only operate as payments, when the money is there actually received, and as three months must elapse between the purchase of bills, and their payment in London, the loss of interest on these three months is greater than paying the debt in this country with an interest of six per cent. The conduct of Voorhees & Co. buying bills of W. & M. in this country, to remit to W. J. & M. of London, in part payment of the goods, is unequivocal evidence of their ideas of the original contract; and as the subsequent change, the privilege of paying in this country, even with six per cent. was for their benefit, had they made use of it, of course they ought not to complain; and if they neglected this benefit, by not paying at all, they have still less reason to complain; besides, coming here for relief against a judgment at law, they ought to shew a clear equity, which they do not in this instance appear to have.

**57** \* 4thly. If any interest is charged on any sums of money after they were paid, since the change of the debt into current



money, it is improper, and ought not to be allowed. If such a charge exists on any sums paid here, while the debt remained a sterling debt payable in London, I think they ought not to be relieved against it if not exceeding three months.

5thly. The sterling draft on the 14th of May, 1790, ought to be credited at the rate of exchange on that day, because it was subsequent to the contract enabling them to pay in this country, and of course ought to be extended, in as much current money as it would then bring if sold here. I do not discover any reason or principle to discriminate between the principal and securities in this case. I think they are equally liable, unless they could shew fraud, imposition, or improper conduct between Voorhees and the defendants, in the settlement or statement of the account. I do not conceive them concluded by the acts or acknowledgments of Voorhees; at the same time I cannot perceive, in this transaction, any superior equity in their favor."

HANSON, Chancellor, (February 29th, 1797,) approving entirely of the opinion of Mr. Key, ordered the auditor to state and return an account, &c. on the principles of that opinion. Which having been done by the auditor, the Chancellor confirmed the report, and dissolved the injunction which had been granted, stating the sum that should be levied on the executions on the judgments at law. The complainants appealed to this Court, and the cause was argued by *Martin*, (Attorney-General,) and *Winchester*, for the appellants, and by *Cooke*, *Key*, (a) and *Shaafl*, for the appellees.

The Court of Appeals, at this term, affirmed the decree of the Court of Chancery.

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\* COURT OF APPEALS, JUNE TERM, 1800.

58

J. & R. YATES vs. PETTY'S Ex'r.

On a bill filed by surviving partners against the executor of a deceased partner, to compel him to account for and pay to them the amount of the partnership goods sent by the deceased partner out of the State, it appeared that partnership goods to a certain amount were sent, with other goods, to the State of Georgia, by the deceased partner, and that the disputes between the surviving partners and the executor, were referred to arbitrators, who awarded, that there being no possible means of identifying the goods, or of recovering the possession thereof, by any process of this State, the surviving partners could only be considered as creditors to the amount thereof; and entitled to payment in a regular course of administration by the executor, according to the laws of Georgia. The questions raised were, whether the surviving partners were entitled to the goods or their value, and whether they were pre-

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(a) Mr. Key was not counsel in the Court of Chancery.

cluded by the opinion of the arbitrators, and the subsequent proceedings under their award, the estate being overpaid under the administration in Georgia. Bill dismissed.

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainants, the present appellants. The bill states, that in 1790, the complainants, and John Petty, (the defendant's testator,) entered into a contract of partnership for the purpose of carrying on trade from Great Britain to America, under the firm of Yates, Petty & Yates, and sometimes known in America, by the names of John Petty & Co. That the complainants transacted the business in Great Britain, and the said Petty in Maryland. That the complainants put in, as the original stock of the partnership, the sum of 3,000*l.* sterling apiece, and the said Petty only the sum of 1,000*l.* sterling—yet by the terms of the contract of partnership, each party was to share an equal part of the profits, and bear an equal proportion of the losses, the said Petty only accounting to the complainants for the interest on that part of the original stock put in by them, which exceeded that put in by the said Petty. That in consequence of the said partnership, and during its continuance, the complainants shipped from Great Britain to Maryland, divers large cargoes of goods and merchandises, which were delivered to the said Petty to be sold, or otherwise disposed of, at the joint risk, and on the account of the said partnership, and which said goods were disposed of and distributed into different stores in different places in this State, viz. in one store in Annapolis, in Anne Arundel County; in another at Easton, in Talbot County; in another at Port Tobacco, in Charles County; another at Lower Marlborough, in Calvert County; and in another at Queen Anne, in Prince George's County. That the said Petty had the whole conduct and management of the business in this State, kept the books of the partnership; and the greater part of the information respecting the transaction herein stated is derived from the said books, so kept by the said Petty.

**59** That \* on the 24th of July, 1792, there were partnership goods in the two stores at Annapolis and Easton, to the amount of 2,726*l.* 11*s.* 4*d.* current money, and at the other stores to a very large amount. That Richard Yates, one of the complainants, was sent into Maryland in 1792, who, on the 24th of July, 1792, entered into an agreement with the said Petty for the goods in the stores at Annapolis and Easton, by which the said Petty was to take all the goods at the said stores at their sterling cost. That besides the above goods at Annapolis and Easton, there were very large quantities of goods at other stores at the different places above mentioned; and the said Petty, continuing the sole management of the partnership business, and settling, &c. to his own advantage, and collecting debts, &c. and applying them to his own benefit, it was thought advisable by the complainants to dissolve the partnership,

which was accordingly done in the month of August, 1792, by consent of all the partners. But, notwithstanding such dissolution, there never was any division of the partnership effects, and the said Petty continued to keep possession of all the goods, at all the stores, and to make the entries in the books of the partnership. That there were, at the different stores of Lower Marlborough and Queen Anne on the 31st December, 1792, and 20th August, 1793, goods to the amount of 3,223*l.* 11*s.* 3*d.* current money. That the said Petty shipped and transported all the said goods to Georgia, without the knowledge of the complainants, and which goods were delivered specially to William Petty, the defendant, by the said John Petty, to be sold for the partnership. That the said John Petty died on the 7th of September, 1793, having made a last will and testament, and thereby constituted and appointed William Petty, the defendant, the executor thereof, who has obtained letters testamentary, &c. and got into his possession the whole of the estate of the said John Petty, and also the unsold goods of the said partnership which had been sent to Georgia as aforesaid, and which were \* not affected or included in the agreement aforesaid with the said **60** John Petty. That the said defendant well knew the said goods were goods of the partnership, to which the complainants had a claim as surviving partners; yet, notwithstanding that knowledge, the said defendant, after the death of the said John Petty, did sell the whole of the said goods then unsold, and apply the proceeds to his own use and benefit, and has never paid nor accounted for the same to the complainants. That they are advised, that all the goods of the said partnership, which they have not relinquished their right to, are liable to the claim of the complainants in the hands of the defendant, if the same came to his possession since the death of the said John Petty, more especially as the defendant had full notice of the complainants' right, and sold the said goods under that knowledge. That they have applied to the defendant for an account, &c. but he has refused, pretending that the said goods were part of the personal estate of the said John Petty, and that his separate creditors are to be paid thereout. But the complainants allege, that the said goods are not to be considered as assets for the payment of the separate debts of the said John Petty; and that the said defendant, having sold them under a knowledge of the complainants' right, is individually liable to the complainants. Prayer for relief, &c. and for a writ of *ne exeat*, as the said defendant, was about to leave the State, &c.

The answer states, among other things material to be noticed, that the only goods belonging to the partnership shipped to Georgia, were from the store at Lower Marlborough, and which were sent with other goods purchased at Baltimore by the testator, and that he could not distinguish what part of the said goods were sent from the store at Lower Marlborough. That the disputes between the complainants and defendant, were referred to William Cooke and Philip

Barton Key, Esquires, who awarded, &c. That as to the said goods shipped, &c. to Georgia, and which could not be distinguished from other goods, &c. the arbitrators awarded, that the complainants

**61** \* should come in as creditors for the value of them, to be paid in a course of legal distribution. He pleads the said award in bar of that part of the bill which calls for an account of subjects settled by the said award, &c. That he administered on the estate of J. Petty in the State of Georgia, and that he has fully and fairly administered the same according to the laws of that State, as by exhibits, &c. and he pleads the same in bar, &c.

The award of Messrs. Cooke and Key, given upon a statement of facts signed by the parties, states, "that as to the goods which were sent from Lower Marlborough out of the State by Mr. Petty in his life-time, there being no possible means of identifying the same, or of recovering the possession thereof by any process of this State, the surviving partners of Mr. Petty can only be considered as creditors to the amount thereof, and entitled to payment in a regular course of administration by the executor of Mr. Petty. With respect to the goods remaining in the State, in the hands of Mr. Harrison, at the death of Mr. Petty, his surviving partners could identify the same, and had never been divested of their property therein, nor of their remedy to recover the specific articles after the death of Mr. Petty by the legal process of this State; we therefore think the goods at Baltimore ought not to have been brought into the administration of Mr. Petty's private estate, but ought to have been delivered to his surviving partners. The executor of Mr. Petty ought to get an allowance by the Orphans' Court to the amount of the goods appraised at Baltimore, as having been brought into his inventory by mistake, on his paying the same to the surviving partners of his testator."

By the accounts settled on the administration in Georgia, according to the laws of that State, the estate was overpaid by the administrator.

The counsel for the parties agreed, that the main object of the bill was only to compel the defendant to account for and pay to the complainants the amount of the goods sent from the Lower Marlborough store to \* Georgia. The complainants abandoned

**62** all the other objects of the bill.

The cause was argued before the Chancellor, by *Martin*, (Attorney-General,) and *Shaafl*, for the complainants, and by *Kilty*, for the defendant.

*Shaafl*, for the complainants. In this case, the only claim which the complainants insist upon, is for the goods sent from the Lower Marlborough store to Georgia.

It is first necessary to prove that the goods were partnership property, what their amount was, and that the defendant had them. This

is done by the testimony taken under the commission, by which the first fact is established, and that the amount was 1,238*l.* 15*s.* 11*d.* and that the goods were packed up and sent to Georgia on the 20th of August, 1793. The answer admits the receipt of the Lower Marlborough store; and the case stated by both parties also proves it. Having proved these facts, two points occur:

*First.* Are the complainants, as surviving partners, entitled to the goods or their value? And, *Secondly*, Are they precluded by the opinion of Messrs. Cooke and Key, and the subsequent proceedings under their award.

As to the first point. On principles of law, partnership property survives—partners are joint tenants, and not tenants in common, and trover might be supported. A partner has a lien on all partnership property, until satisfaction of the general balance; so here the Lower Marlborough store being partnership property, it is answerable for the balance. These principles are sanctioned by the authorities—2 *Vern.* 293; 3 *P. Wms.* 182; 2 *Brown.* 15; 1 *Ves.* 239, 242; *Cowp.* 471, 445.

*Secondly.* The effect of the award is next to be considered. The award itself is bad on the face of it. The complainants must be entitled to the whole, or none; and though the goods cannot be distinguished, their value can be ascertained.

\* An award, bad on the face of it, may be set aside. 2 *Vern.* 705; 1 *Eq. Ca. Ab.* 51. But nothing has been done 63 under this award; there was no distribution, and the answer is false. The account admitted proves it, and the receipt is before the award, and is for the sum due for the Annapolis and Easton stores, as appears by the statement of the parties. The account sent to Georgia to be passed is for the goods of the Lower Marlborough store; and why did the defendant agree to take it and pass the account if it had been before paid? The Georgia administration cannot affect this case, because it is only the administration of the defendant of assets on which the Court there acted; but these goods did not belong to the testator's estate, but to the complainants.

*Martin*, (Attorney-General,) on the same side. Where there are two partners, and one dies, the legal interest of all the partnership property, whether consisting of goods on hand, or debts due to the concern, survives to, and is in, the surviving partner; and the executor or administrator of the deceased partner cannot hold any of the partnership effects against the surviving partner, who alone being at law answerable for all debts due from the partnership, is alone entitled at law to the possession and disposition of the partnership effects, to enable him to discharge those debts, and make a settlement of the partnership concerns. For this see *Watson's Law of Partnership*, 1, 19, 20, 21, 52, 110, 116, 282, 285, 294, 184, 192, 140, 128, 146, 147, 124, 136, 295, 49, 60, 62, 63.

**65** \* The complainants and defendant state a case relative to certain goods, which belonged to the partnership, some of which were in Baltimore, and some in Georgia; and they refer to Mr. Cooke and Mr. Key, to decide, whether the whole or part of the said goods, should be considered the private property of the defendant's testator, or belonging to his surviving partners. The arbitrators do not determine that the goods in Georgia did not belong to the surviving partners, but that the surviving partners can only be considered as creditors to the amount thereof, and entitled to payment in a regular course of administration by the defendant as executor, "because there were no possible means of identifying the same, or of recovering the possession thereof by any process of this State." How did the arbitrators find out that there were no possible means to identify the goods carried to Georgia? The statement conveys no such idea. It does not state that the goods were mixed with any others—it does not even state that the goods had been

**66** opened or unpacked \* after their arrival in Georgia. But even if they had been opened, and mixed with other goods, where was the impossibility, the goods all remaining on hand, and the invoices being in existence, to have identified them? Where did those gentlemen discover that by a man's taking another person's goods, and mixing them with his own, so that one cannot be discovered from the other, such other person loses his right to such as were his? The law in such a case is the reverse, and the wrongdoer would lose the property with which he had so mingled another person's, and such other person would have a right to take the whole. At all events, it will not be questioned that he would have a right to compel him, who had done the wrong, to pay the full value; 1 *Str.* 505; 15 *Vez.* 432; and if such wrong was done, it was done by the defendant, for the goods were not received by him until his testator's death. Where did the gentlemen discover any law which justified them in saying that, because the surviving partner had no possibility of recovering the possession of the goods in Georgia by process of this State, therefore the goods did not belong to the surviving partners? It is the first time it was ever suggested, that the taking a man's property from him, and removing it to another State, where the process of this State does not run, does thereby destroy his right of property. The truth is, the arbitrators did not decide that the goods in Georgia did not belong to the surviving partners, which was the only question submitted to them. They had more sense, and more legal knowledge, than to suppose that either of the reasons or facts assigned by them altered the right of property, but they seem to have apprehended that the difficulties which the surviving partners would have to enforce such right, were such, that it would be better for them to come in as creditors. That however was a question which they were not appointed to decide; nor did they know, at that time, that under the laws of Georgia, in adminis-

tering the estate, the amount of those very goods would be sunk in paying other creditors, and that the surviving partners \* would be unable to get one shilling. If they did, it must be admitted **67** they were very faithless advisers! But it is certain they did not know it, whatever might have been the case with the defendant. So much for the award, which is not within the submission, or if it was, is a nullity, as being in direct violation of every principle of law and equity.

'HANSON, Chancellor,' (May Term, 1799,) decreed, that the complainants' bill of complaint be dismissed without costs. From which decree the complainants appealed to this Court; but the case at this term was entered agreed.

GENERAL COURT, (E. S.) SEPT. TERM, 1800.

RUSSELL'S Lessee vs. BAKER.

The Lord Proprietary had not the royal rights of the King of England, and and he might be barred by the Act of Limitations and adverse possession of lands, which he claimed by escheat, &c. (a)

Where the Lord Proprietary, and J. Y. were tenants in common of a tract of land in 1686, at the time when the Proprietary was in Maryland, where he remained for two years thereafter, and J. Y. entered upon and claimed the whole tract adverse to the right of the Proprietary, &c. and where J. Y. and those claiming under him, had the uninterrupted possession of the land, claiming the whole from the year 1687 to 1780, and the Proprietary accepted quit rents for the whole of the said land from 1788 to 1767 from J. Y. and those claiming under him—*Held*, that the Lord Proprietary was barred by the adversary possession of J. Y. and those claiming under him. (b)

LUX vs. PELLETT, *note*:

Where D. is in possession of vacant land, which the Proprietary afterwards grants to P. who enters, but is ousted and continued out of possession at the time of making his will and death—*Held*, that the possession of D. was an intrusion, and that P. was not disseised, but that the land passed by his will to his devisees.

EJECTMENT for a tract of land called Clayfall, lying in Cecil County. Defence was taken upon plots made and returned in the cause.

1. The plaintiff, at the trial, offered in evidence to \* the jury, a lease from the Lord Proprietary to Samuel Thomas, **72**

(a) See *Howard vs. Moale*, 2 H. & J. 249; *Kelly vs. Greenfield*, 2 H. & McH. 121; *Alex. Br. Stat.* 455.

(b) Distinguished in *Hall vs. Gittings*, 2 H. & J. 114; Cf. *Van Bibber vs. Frazier*, 17 Md. 486; *Hammond vs. Morrison*, 33 Md. 95; *Lloyd vs. Gordon*, 2 H. & McH. 254.

Junior, (a) dated the 24th of December, 1748, for 540 acres of land, part of his Lordship's manor of Susquehanna, *alias* New Connought, lying in Cecil County, for and during three lives, viz: the life of the said Thomas, and of Richard and John Thomas, at a certain annual rent. That the said Samuel Thomas died in July, 1784, having by his will devised the lands in the said lease mentioned to his daughter, Anne Russell, the lessor of the plaintiff. That John Thomas mentioned in the said lease is yet living. The plaintiff also gave in evidence a grant from the Lord Proprietary to Francis Wright, dated the 19th of September, 1659, for 500 acres of land called Clayfall, "lying at the head of Chesapeake Bay, on the N. side of the said bay, &c. formerly laid out for Francis Clay, but for non-performance of conditions, again fallen into our hands." And that the land therein mentioned is the same land as is contained in the said lease, and that the said land is truly located on the plots returned in this cause. The plaintiff also offered in evidence, the will of the said Francis Wright, dated the 25th of July, 1666, whereby he devised unto his brother Raphael Wright, of Covill, in the parish of St. Andrew's in Glamorganshire, in Wales, his house and lands known by the name of Clayfall, in the County of Baltimore, with all things thereunto belonging; and that when his said brother should arrive in the country, that he cause the land and house, and all the negroes, &c. to be appraised, &c. and the one-half of the amount so ascertained, he gave by his said will unto Jacob Clawson de Young, late of this Province, &c. and the will also provided, that in case his said brother Raphael, should die before he came to enjoy the said land, &c. that then the said premises as he gave them to his brother Raphael, should go unto his brother Thomas Wright, and to his heirs, for ever, &c. The will was proved on the 20th of March, 1667, by

**73** the two witnesses who attested the execution thereof. \* The plaintiff also gave in evidence, that the said Francis Wright died in the year 1667, without heirs, and that thereby the whole, or a moiety of the said land granted to the said Wright, escheated to the Lord Proprietary; and to prove the same, the plaintiff read in evidence to the jury, a record of the proceedings in an action of ejectment brought in the late Provincial Court by *Samuel Thomas' Lessee* against *John Hamilton*, for his Lordship's manor of Susquehannah, or New Connaught, lying in Cecil County, and judgment rendered therein at April Term, 1752; [see 1 *Harr. & McHen.* 190.] wherein it is stated in the bill of exceptions taken at that trial, "that the said Francis Wright in the year 1667, died seised of the premises in the declaration, without heirs, whereby the land escheated to the Lord Proprietary." The plaintiff further gave in evidence, that the said John Hamilton, (the defendant in the said

(a) See the lease mentioned in the case of *Thomas' Lessee vs. Hamilton*, 1 H. & McH. 190.



action of ejectment in the record aforesaid mentioned,) was rector of the parish of St. Mary Ann, to the vestry of which said parish a deed had been executed by a certain John Currier, and Meliscent his wife, on the 7th of June, 1748, "for a part or moiety of a certain tract of land called Poplar Neck, being part of a tract called Clayfall," containing 100 acres, and that the said John Currier held the said part of Clayfall, and claimed the same under a deed from Jacob and John Young, dated the 7th of May, 1748. The plaintiff then gave in evidence two grants from the Lord Proprietary to George Talbot, one for the manor of Susquehannah, containing 32,000 acres, lying in Cecil County, and dated the 11th of June, 1680, and the other a grant of confirmation for the said land called Susquehannah Manor, *alias* New Connought Manor, containing 32,000 acres, and dated the 22d of March, 1683. The plaintiff also gave in evidence a deed from the said George Talbot to Jacob Young, the devisee in the will of the said Francis Wright, dated the 10th of June, 1687, reciting that Francis Wright died possessed of 250 acres of land in a tract called Clayfall, and leaving no lawful heirs after him, nor having made any written testament \* before his decease, the same became escheatable to the Lord 74 Proprietary, and that the Lord Proprietary by patent dated the 11th of June, 1680, and also by a patent of confirmation of the 21st of March, 1683, granted to the said Talbot all that tract of land called Susquehannah, *alias* New Connought Manor, saving to all persons who had former patents of any land within the natural bounds of the said manor the full benefit of their respective patents, they paying to the said Talbot the rent of, &c. by which grant the escheat of the said 250 acres in Clayfall aforesaid, became the right of the said Talbot; and that the said Talbot, in consideration of, &c. granted, &c. to the said Jacob Young, his heirs and assigns, for ever, all his right, &c. in and to the said 250 acres of land, and the escheat thereof, upon account of the want of heirs or assigns deriving title to the same from the said Francis Wright, deceased. The plaintiff then gave in evidence a record of the conviction of the said George Talbot, which states, that the said Talbot had been convicted, and a judgment rendered against him in the General Court of the then colony of Virginia, on the 20th of April, 1686, for stabbing, contrary to the statute in such case made and provided, a certain Christopher Rousby, in the year 1684, on board of his Majesty's ketch the Quaker, riding in the capes of Virginia; the record also states, that the said Talbot, on the 20th of April, 1687, presented his Majesty's most gracious pardon, which was received. The plaintiff also gave in evidence, that the Lord Proprietary left the then province of Maryland, and went to Europe, some time in the year 1688; that about that time a civil war took place in Maryland, and an armed force took possession of the colony of Maryland in favor of King William and Queen Mary, and that a convention appointed thereby

assumed the powers of government in the said colony; that the government of the said colony was exercised by the Kings and Queens of Great Britain until the year 1716, when it was again restored to the Proprietary; and that the said Proprietary did not

return to the colony until some time in the year 1732. \* That  
**75** the said Lord Proprietary claimed the said lands leased to the said Samuel Thomas, as part of the manor of Susquehannah or New Connought, which he claimed as vested in him by the conviction and attainder of the said Talbot. That the record of the said conviction was not transmitted to the colony of Maryland, and made a record of that colony, until in the year 1717.

The defendant then offered in evidence the will of the said Jacob Young, dated the 22d of February, 1696, whereby he devised to his son Joseph, the plantation which he then lived on, &c. and also the will of the said Joseph Young, dated the 10th of April, 1727, whereby he devised to his sons Samuel and William, and their heirs, for ever, all that plantation he then lived upon; and to his sons Jacob and John, and their heirs, for ever, all that plantation which was commonly called Poplar Neck, then in his possession; and to his son Joseph, and his heirs, for ever, all that plantation called Hanleys, &c. The will also provided that his said sons should not give, sell nor dispose of the said lands, except to each other, or to their children. The defendant further gave in evidence, that the said Joseph Young, the testator, died leaving five sons, to wit, Samuel, the eldest; Joseph the second; John, the third; Jacob, the fourth; and William, the fifth and youngest. That Samuel died leaving two daughters, Mary or Polly, and Prudence, and a widow; that the widow intermarried with one Fogg; that Mary intermarried with one Douglass, and Prudence with one Clark or Jones; that John died intestate, and without issue, leaving a widow, who afterwards intermarried with one Foster; and that Jacob and John Young executed to John Currier, the deed before mentioned; and also gave in evidence the before mentioned deed from John Currier to the vestry of St. Mary Ann's Parish; and also gave in evidence, that he, the defendant, claimed the said land called Clayfall, under the title of the devisees of the said Joseph Young, and under the deed to the said Vestry; and that the said Jacob Young was in possession of a moiety of Clayfall

aforesaid, at \* the time of the conviction and attainder of the  
**76** said Talbot; and that after the said deed from the said Talbot to the said Jacob Young, he the said Jacob did possess the said tract of land, claiming a right to the whole thereof, until his death; and that the said Joseph, his son, after the death of Jacob, and in virtue of the said will, entered upon, and was in possession of the said tract claiming the whole thereof until his death; and that the said sons of the said Joseph, in virtue of his will, respectively entered upon and were in possession of the parts devised to them of the said tract called Clayfall, after the death of the said Joseph, by them-

selves and their alienees, claiming the whole of the said tract, until the year 1780. The defendant further offered in evidence, copies or extracts from the debt books of Cecil County, and the rents rolls, remaining in the land office, duly authenticated. By the rent roll, in 1737, it is stated, that Clayfall, 500 acres, was surveyed for Francis Clay, and possessed by Samuel Young. By the debt books in 1737, it is stated, that part of Clayfall, 250 acres, was charged to Jacob Young, and another part, 250 acres, charged to Joseph Young. In 1739 the whole is charged to Samuel Young. In 1749, 100 acres were charged to the Vestry of St. Mary Ann's Parish; 200 acres to Amos Fogg; 100 acres to Thomas Foster, and 100 acres to Joseph Young. In 1754 and 1755 the same charges. In 1758, the same, except that Henry Baker was charged with the parts before charged to Fogg and Foster. In 1761, 100 acres charged to Henry Baker; 300 acres to Amos Fogg, John Douglass, and John Clark, and 100 acres to the Vestry of St. Mary Ann's Parish. In 1767, the same charges. In a book, without date, 400 acres were charged to Jeremiah Baker, and 100 acres to the Vestry, &c.

Whereupon, the defendant by his counsel prayed the Court for their opinion and direction to the jury, that the Lord Proprietary, and Jacob Young, on and after the conviction of the said George Talbot in 1686, were tenants in common of the tract of land called Clayfall; and if the jury find that the Lord \* Proprietary was in the then Province (now State) of Maryland, at the time of the said conviction, and for two years thereafter, and at the time of the deed from the said Talbot to Young in 1687; and if they are of opinion that Jacob Young entered upon and claimed the whole of the said land adverse to the right of the Lord Proprietary, until his death in 1696, and that he devised the said land to his son Joseph, and that his son Joseph, in virtue of the said will, entered on the said land, claiming the whole thereof adverse to his co-tenant, the Lord Proprietary, and continued such possession until his death in 1732; and if they further find, that the said Joseph died in possession of the said land, claiming the whole, and devising the whole as his own proper estate to his five sons, and that his said five sons, in virtue of his said devise, entered upon and possessed the said land, claiming the whole thereof adverse to the title of the Lord Proprietary, and as their own proper estate, and continued the said possession by themselves, or their alienees claiming the same adverse to the title of the Lord Proprietary, and as their own proper estate, and continued the possession thereof down to the year 1780, notwithstanding the lease to Samuel Thomas; and if they further find that the said Lord Proprietary, by his agents and officers, accepted from the devisees and alienees of the said Joseph Young, and his sons, quit-rents for the whole of the said land, from the year 1733 until the year 1767, and that Jacob Young and Joseph Young, and those claiming under them, had the uninterrupted possession of the said

land, and the receipt of the rents and profits thereof, claiming the whole of the same as their own, from the year 1687 to the year 1780, that then the plaintiff is not entitled to recover.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.) The Court are of opinion, and direct the jury that in case they find the facts stated by the defendant to be true, that then the plaintiff hath not  
 78 made out title to the land for which this \* ejection is brought, nor to any part thereof, although they should find the facts stated by the plaintiff to be true. The plaintiff excepted.

2. The plaintiff, by his counsel, then prayed the Court for their opinion and direction to the jury, (upon the statement aforesaid,) that although the Lord Proprietary and Jacob Young, on and after the conviction of the said Talbot in 1686, were tenants in common of the tract of land called Clayfall; and although the jury should find that the Lord Proprietary was within the Province (now State) of Maryland, at the time of the said conviction, and for two years thereafter, and at the time of the deed from Talbot to Young in 1687, and that Jacob Young entered upon and claimed the whole of the said land adverse to the right of the Lord Proprietary, until his death, and that he devised the said land to his son Joseph, and that his son Joseph, in virtue of the said will, entered on the said land claiming the whole thereof adverse to his co-tenant, the Lord Proprietary, and continued such possession until his death; and although they should further find that the said Joseph died in possession of the said land, claiming the whole, and devising the whole, as his own proper estate, to his five sons, and that his said five sons, in virtue of his said devise, entered upon and possessed the said land, claiming the whole thereof adverse to the title of the Lord Proprietary, and as their own proper estate, and continued the said possession by themselves, or their alienees, until the time when the said lease was made by the said Lord Proprietary to the said Samuel Thomas; and although they should further find that the said Lord Proprietary, by his agents and officers, accepted from the devisees and alienees of the said Joseph Young, and his sons, quit-rents for the whole of the said land, from the year 1733 until the time of the execution of the said lease to the said Thomas, and that Jacob Young and Joseph Young, and those claiming under them, had the uninterrupted possession of the said land, and the receipt of the rents and profits thereof, claiming the whole of the same as their own from  
 79 the year \* 1687 to the time of making the said lease to the said Thomas, that then notwithstanding, the lease of the said land by the Lord Proprietary's agent to the said Samuel Thomas was operative to pass an estate in the said lands, the said Lord Proprietary only claiming the same as part of the said manor.

CHASE, Ch. J. The Court are of opinion, that the lease from the Proprietary to Samuel Thomas is not operative to pass the land

called Clayfall, nor any part thereof, to the said Samuel Thomas, and that the plaintiff has failed to make out title to the land for which this ejectment is brought. The plaintiff excepted. Verdict for the defendant, and judgment thereon. The plaintiff appealed to the Court of Appeals; and the case came on for argument in that Court at November Term, 1803.

*Martin*, (Attorney-General,) for the appellant. In this case two prayers were made to the General Court, the first by the defendant, and the other by the plaintiff; and the opinions given by that Court upon both prayers were, that the plaintiff was barred by limitations from recovering. The opinion in the first bill of exceptions is, that the lessor of the plaintiff was barred; and in the second, that at the time of the lease by the Lord Proprietary to Thomas, the Lord Proprietary was barred.

1. The first point was, whether or not the Lord Proprietary could be barred by limitations? 2. The second, Whether or not the Lord Proprietary could be barred by the possession of the persons mentioned in the bill of exceptions, so as to preclude his making the lease to Thomas? And 3. The third, Whether or not the Lord Proprietary, having no interest in the land at the time, could make the lease to Thomas?

The General Court considered, that the case of *Kelly's Lessee vs. Greenfield*, 2 *Harr. & McHen.* 121, decided the questions in this cause. It was therefore adjudged without argument. The case of *Kelly vs. Greenfield* however, has never been acted upon by the \* Court of Appeals, nor has any point been decided in this Court which will preclude an investigation of the questions arising in this cause; neither was any opinion given in the case of *Kelly vs. Greenfield* by the General Court, by which this case can be affected. The opinion which has gone forth as the opinion of the General Court in that case, was a mere *dictum* of the then Chief Justice HARRISON, and had nothing to do with the case before the Court. It was one in which the other Judges did not concur, as will appear by a statement of one of them, (the present Chancellor HANSON,) in 2 *Harr. & McHen.* 140. The decision there turned upon the point of relation, and the judgment given was a correct one. But as the Court decided that the patent offered in evidence by the defendant should relate to the certificate, and that therefore the plaintiff could not recover, there was no necessity for them to determine whether or not the Lord Proprietary was barred by limitations, since that question could only arise from their having decided that the patent should not have such relation. If the Proprietary grants land, though not under the proper warrant, yet so long as the grant is unrepealed, it is good. He had a right to dispense with the rules of his land office, and grant land which was liable to escheat to any person who might take it up under a common warrant. He might have repealed the grant on

account of deception, if there had been any used; but until the grant was repealed, he was bound by it, and could not grant the same land to any other person. The opinions of Chief Justice HARRISON are entitled to very great respect. He was a gentleman of great legal information and moral worth. Certain points decided by him in the case referred to, are certainly correct, such as the five first points; all of which go completely to decide the case in favor of the defendant. But the decision upon the sixth point was on matter *de hors* the record, and was not demanded by the case before him. The opinion upon the seventh point may be proved an incorrect opinion, and there is no authority in support of the decision upon the eighth point.

**81** \* Opinions, which have no relation to the case to be decided, or are not necessary to be given, are to be considered as mere *dicta* of the Judge, and not as judicial determinations. *Vaugh. Rep.* 382. On its being suggested that the General Court had, in the case of *Kelly vs. Greenfield*, decided that the Lord Proprietary was barred by the Statute of Limitations, Chancellor HANSON thought fit to protest against such a suggestion, and pronounce it unfounded. We admit that all the points which are stated to have been decided in the case of *Kelly vs. Greenfield*, were raised by the counsel. But it is wholly immaterial how many points were raised, if it was unnecessary to decide on all of them.

[The Court of Appeals stopped the Attorney-General, and POTTS, J. said that the opinion stated to have been delivered in the case of *Kelly vs. Greenfield* is to be considered as the deliberate opinion of the General Court as delivered by Ch. J. HARRISON.]

Let us now inquire, what were the rights of the Lord Proprietary? He was invested by the charter of Maryland with all the rights which the king had; "with all and singular such, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatsoever, as well by sea as by land, within the region, islands, islets and limits aforesaid, to be had, exercised, used and enjoyed, as any Bishop of Durham, within the bishoprick or county palatine of Durham, in our kingdom of England, ever heretofore hath, had, held, used or enjoyed, or of right could or ought to have, hold, use or enjoy." *4th clause of the Charter of Maryland*. It becomes necessary then to investigate what royal rights were ever granted to the Bishop of Durham, in order to find out what have been granted to the Lord Proprietary of Maryland.

Before the Statute 27 Hen. VIII. ch. 24, the Bishop of Durham was as a king, and might pardon all matters, and had *jura regalia*, but that statute took away part of his privileges. 6 *Vin. Ab.* 574,

**82** 575. That \* statute however did not affect the Lord Proprietary of Maryland, because he was vested, under the charter, with all the rights which any Bishop of Durham ever had. With respect to royal rights and prerogatives, he cited *Cro. Jac.* 512,

513; *Cowper*, 108, 175, 213, 520, 521; 4 *Inst.* 204; *Davis' Rep.* 62; *Jacob's Law Dict. tit. Regalia*. The Lord Proprietary of Maryland might have been aptly styled a king, for he had right to make war and conclude peace. He had more power than the State of Maryland now has. 12th clause of the Charter. "Counties palatine, (1 *Blk. Com.* 118,) are so called a *palatio*, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had in those counties *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as *Bracton* (l. 3, c. 8, s. 4,) expresses it. They might pardon treasons, murders and felonies; they appointed all Judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*." 4 *Inst.* 204; 6 *Vin. Ab.* 575. The Lord Proprietary had a right to grant titles of nobility. He was the fountain of all honors, and had the same powers in Maryland as the king had in Great Britain, and was always considered in Maryland as standing in the same situation which the king held in Great Britain. (a) All laws, writs and commissions, were in his name, and the Calverts, who governed the Province, was as careful and as attentive to the interests of the subjects here, as the king was in Great Britain, and the people of the Province were as happy under the reign of the Calverts, as the people ever were under the reign of any of the kings of England. As to titles *in pais*, limitations were never considered as extending to the Lord \* Proprietary, and there is no instance of his being barred, except 83 it was expressly provided for by Act of Assembly. This is the well known principle in all criminal prosecutions; and with respect to landed interest, there never was a notion entertained, that the title of the Proprietary was barred by limitations, or adverse possession. This Court must decide now, in the manner the case would have been decided before the Revolution. It was never thought that the Proprietary was obliged to bring a writ of escheat; and no instance can be shewn, where a writ of escheat was brought; but the universal practice and understanding has been, that if land escheated to the Proprietary, the right immediately accrued to him without any act on his part. He adopted certain rules in his land office, by which escheat and other lands belonging to him, were to be granted; and it was never supposed that improved ungranted lands, no matter how long possessed by any person, could not be taken up as vacant; nor that to grant escheat lands there was first a necessity for an office found. In the case of *Thomas' Lessee vs. Hamilton*, (1 *Harr. &*

(a) The special verdict in the case of *Brerewood's Lessee vs. Jenifer*, Agent of the Lord Proprietary, states, that the Lords Proprietary of the Province always claimed and exercised royal rights in the Province flowing from the charter, and that the Courts of law adjudged them to have such rights. So also in *Calvert's Lessee vs. Eden, et al.* 2 H. & McH. 279.

*McHen.* 190,) it was determined, that the grant operated so as to convey the escheat land. No person could obtain possession by entering upon the lands of the Proprietary, so as to bar his right, no matter for what length of time such possession continued. It was an intrusion, and not a legal possession. This point was decided in the case of *Lux's Lessee vs. Pellett et al. (a)* in the General Court at May Term, 1791, where it was determined that the possession of the defendants of lands, not granted, \* did not bar the Proprietary, nor those claiming under his grant. The Proprietary could never be disseised—no act of an individual could disseise him in contemplation of law. He was the original proprietor, and no one could be seised but under him. To show that the king could not be disseised, cited 4 *Bac. Ab.* 200, and as applicable to the Lord Proprietary, 4 *Bac. Ab.* 198. On an escheat for the want of heirs, the law gives the possession to the king without office found. *Plow.*

(a) *Lux's Lessee vs. Pellett, et al.* General Court, May Term, 1791. Ejectment for a tract of land called Bell Hatch, lying in Baltimore County. Defence was taken upon warrant, and plots were made. Verdict for the plaintiff as to part, and for the defendant as to the residue, at September Term, 1774. The following point was saved for the opinion of the Court thereon, viz. The plaintiff, to make out his title, shewed in evidence the certificate of survey and grant for the land mentioned in the declaration in this cause; and also shewed in evidence the will of Nicholas Ruxton Gay, the grantee of the said land, whereby the said land is devised, or mentioned to be devised to the lessor of the plaintiff.

The defendants gave in evidence, that they were before and at the time of the date of the said certificate of survey, in the actual occupation of the said land mentioned in the said certificate and grant; and that after the date of the said certificate, and before the date of the said grant, to wit, in the year 1765, several persons, by the command, and as the servants of the said N. R. Gay, entered on the said land, in houses thereon then being, and therein resided as under the right or title of the said N. R. Gay, for the space of ten weeks or two months, and not longer; and that Francis Philip, as servant and agent of the defendants, ousted the said servants of the said N. R. Gay; and that the defendants have always since continued in the occupation of the said land, claiming the same as their right and property. It was not proved that the said N. R. Gay, or any other person, ever made any other entry on the defendants, or disturbed their said occupation of the said land.

The defendants thereupon objected, that the devise to the lessor of the plaintiff is void, because, as they allege, the said N. R. Gay was, by the Acts aforesaid, disseised of the said land, and was continued disseised at the time of his making his will aforesaid, and at the time of his death, which was in the year 1770. The consideration of which point is reserved for the opinion of the Court, &c.

*S. Chase*, for the plaintiff.

*Martin*, (Attorney-General,) for the defendants.

The General Court, [GOLDSBOROUGH and J. T. CHASE, J. (a)] gave judgment on the point saved, *nunc pro tunc*, for the plaintiff.

See also 2 *Harr. & McHen.* 145, *per* HANSON, J.

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(a) JOHNSON, Ch. J. had been counsel for the plaintiff.



229, 230. A grant is to be taken most strongly against the grantor, and in favor of the grantee. The king may grant a *chose in action*. *Plow.* 243, 249. Nobody can disseise the king. He may be wrongfully dispossessed, but the intruder's injurious possession is *sine aliquo vestimento*, and called an intrusion. 1 *Burr.* 109. So if lands belong to the king by attainder, or other title, though they are concealed, &c. the king may, when discovered, grant them to another; for no time runs against the king. 4 *Com. Dig. tit. Prerogatives*, 414, (*D.* 65,) 415, 417, 460; 3 *Co.* 10b. The king, as well as a common person, may make a grant of all lands, &c. which are vested in him. He may grant land coming to him by descent \* or escheat, without office found, for the freehold is cast upon him by law. 3 *Com. Dig. tit. Grant*, (*G.*) 450, 451; *Cro. Eliz.* 508; 10 *Vin. Ab.* 145; *Sar.* 1, 8, 7; 9 *Co.* 95b; 4 *Co.* 58a. In the seventh point, said to be decided in the case of *Kelly vs. Greenfield* the Court only determined that the Proprietary did not acquire the same rights with respect to Maryland, which the king of Great Britain had in England. They determined negatively upon the rights acquired under the fifth section of the charter. The Proprietary certainly had the same, and more powers than any Bishop of Durham ever had. The fourth section of the charter gave him the same rights, and other sections gave him others, and more extensive powers. He had a right to enact laws, which the Bishop of Durham had not.

*Key* and *Harper*, for the appellee. It is said that by the charter of Maryland the Lord Proprietary had all the rights of a Bishop of Durham; and it is contended that the Bishop of Durham had *regalis potestas in omnibus*, and therefore, that the Proprietary of Maryland had. No Bishop of Durham ever had *jura regalia* more than to a certain extent. He had certain royal rights, and so had the Proprietary. It was inconsistent with the liberties of the people that extensive powers should be vested in the Proprietaries. There could not be kings under kings. Whether the king himself could, in a case like the present, have the right of escheat without office found; and whether the Proprietary, upon the conviction and attainder of Talbot was entitled, under a prerogative right, to the moiety of the land for which the ejectment is brought, are questions for the consideration of this Court. In the case of *Burgess vs. Wheate*, 1 *W. Blk. Rep.* 123, Lord Mansfield said, that an escheat is a reversion which takes effect in the lord by the failure of heirs. Escheat is one of the fruits and consequences of feudal tenure, whereby the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee; but in order to \* complete this title by escheat, it is necessary that the Lord perform an act of his own, by entering on the land so escheated, or suing out a writ of escheat. It is in some respect a title acquired by his own act, as well as by act of law. The right by escheat is distinguishable from a prerogative right. 2 *Blk. Com.* 247. Upon an attainder, by prerogative, the king is to have all

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the lands, &c. For petty treason the lands go to the lord of whom they are holden, and the lord is in by escheat. 4 *Bac. Ab. tit. Prerogative*, 155. The right by escheat is a feudal, and not a prerogative right. A prerogative right is for the benefit of the people, and not for the king. When a right in escheat attached to the Lord Proprietary, he claimed it in a different manner from the rights which he acquired under the charter. In the year 1686, Talbot was convicted and attainted, and *eo instanti* the right of escheat, (if at all,) accrued to the Proprietary in the same manner as if Talbot had died without heirs. His Lordship being then in the Province, and not leaving it until 1688, the right vested in him at a time when he was present and capable of asserting it; not having done so, the Statute of Limitations commenced to run against him, and having once commenced, it never stops, but is a complete bar at the end of twenty years. So by analogy, possession held adverse for twenty years is a bar. The Proprietary, on rights acquired *in pais*, stands on the same ground as all other citizens. No lapse of time can bar one tenant in common, as against his co-tenant, so as to prevent his suing out his writ of partition, unless the possession of such co-tenant has been adverse and exclusive, or unless the right of entry of such tenant is tolled by descent cast under the statute of 32 Hen. VIII, ch. 33. *Lloyd vs. Gordon, et ux.* 2 *Harr. & McHen.* 254. Circumstances may occur when one co-tenant may be barred by limitations. *Coeper*, 218. The Lord Proprietary was never considered a monarch. He held the province as a subject of the crown of Great Britain. There could not be

87 two kings governing the same subjects at one and the \* same time. The foundation of prerogative rights in the Proprietary is said to flow from the charter. There are no such rights vested in him by the charter, even admitting the king could have vested any such in one of his subjects. The same rights were given as had been vested in any Bishop of Durham, and no Bishop of Durham ever had a right to make laws, or to declare war or conclude peace. They never had *jura regalia*. The king could vest no such rights in a subject. It was not in the power of the king to confer the right to declare war. The Province was granted to the Proprietary as an asylum to himself and a number of wealthy Roman Catholic subjects, who in the mother country were persecuted on account of their religious principles, but they were to continue subjects of the king notwithstanding such grant. "The reign of the Calverts" is a new term, never heard of till introduced into this cause by the attorney-general. One of the first acts of the Proprietary was the establishment of a land office for the purpose of tenanting out his lands, which could not be done without such an office, and whenever there was an escheat he took the land under the feudal system, being a right acquired under \* that system. He had no seignorial rights, and 89 *nullum tempus*, being a prerogative maxim, did not apply to him. The king's revenue is derived, in part, from the rents of his

lands and for services performed. The Proprietary of Maryland was never personally engaged in legislation, nor in his Courts. The Bishop of Durham had certain limited royal rights, and so had the Proprietary, but they had not all the royal rights of the king. 6 *Vin. Ab.* 575; *Davis*, 62. They were subjects of Great Britain, owing allegiance to the king, as did those over whom they presided. The Parliament could create penalties and annex forfeitures, taking away property, and vesting it in the crown. 4 *Inst.* 204; 6 *Vin. Ab.* 575. This shows that neither the Bishop of Durham, nor the Proprietary, were sovereigns.

There is however another view of this case. The murder of Rousby by Talbot was not an offence against the laws of Maryland; neither the indictment, nor any part of the proceedings, state it to have been a violation of those laws; and consequently there was no forfeiture of his lands in Maryland. Why forfeiture occurs, see 4 *Blk. Com.* 381. Whether this Court can take notice of the conviction and attainder of Talbot, for an offence not committed within the Province, but on a trial and conviction in Virginia, is a question for the consideration of the Court. Even if the Court can notice the record of the proceedings which took place in Virginia, yet, as the Bishop of Durham \* was not entitled to forfeitures created by statute entered after the grant, (4 *Inst.* 205, 216,) neither was 91 the Proprietary entitled to those created by statute enacted after the charter. If the Proprietary did not claim under the forfeiture on the attainder of Talbot, as Proprietor, and as one of his rights derived under the charter as count palatine, but merely as a feudatory lord of the fee, then he stood upon the same ground with any other lord of the fee, as a mere private individual, and in that capacity he might be barred by the Statute of Limitations. It does not appear that there was any act done by the Proprietary for a period of 100 years, to acquire a right under the escheat in this case.

*Martin*, (Attorney-General,) in reply. The question upon the subject of the conviction of Talbot, was decided in the case of *Thomas' Lessee vs. Hamilton*, 1 *Harr. & McHen.* 190, and this Court is bound by that decision. It has been stated that the offence was not committed in Maryland, and that the trial and conviction took place in Virginia. There was no necessity that either the offence or the conviction should have been in Maryland. It was only necessary that the person attainted should have property here. The offence of mortally stabbing another is punished as murder. 4 *Blk. Com.* 193. There was no more necessity for the Proprietary or his officers, to enter upon the land escheated, than there was to enter upon any land which he had never granted; nor was there any occasion for the surveyor, under the escheat warrant, \* to survey the land, for the escheat grant would have the effect to grant the original tract by the same metes, and 95 bounds, and quantity. In the case of *Greaves vs. Dempsey*, 1 *Harr.*

& *McHen.* 65, the special verdict expressly finds that there were was no inquisition or office found of the escheat, and yet the person under the escheat grant from the Proprietary, recovered. The lease from the Proprietary to Thomas, it is true, was not made until the year 1748, and the escheat had fallen in 1684, when the offence was committed by Talbot; and as the Proprietary had no knowledge of the conviction and attainder of Talbot, until 1717, the Statute of Limitations, if it had the effect to bar, did not begin its operation until then, if the Proprietary was in the Province; but it is in proof, and so stated in the record, that he was absent from the Province, beyond the seas, from the year 1688 until 1732, during which time, or a greater part of it, the government of the Province was in the hands of other persons who had taken possession of it by force. The Proprietary, it has been said, ought to be barred, because he never busied himself in the affairs of the Province, but acted by his officers. It is precisely the same case with the king, who conducts his affairs by his officers. But with respect to the Proprietary, we have record evidence, that Charles, Lord Baltimore, then the Proprietary, presided in person, \* in the Assembly, and  
**97** in the Courts in the years 1676, and from 1681 to 1688. 4 *Harr. & McHen.* 477, and *Bacon's Laus of Maryland*.

*Harper.* In the case of the *Proprietary vs. Bond*, 1 *Harr. & McHen.* 210, it was decided, that the Proprietary was barred by limitations, not having brought the action, being on a sheriff's bond, within five years. The action was to recover money due to the public for ordinary licenses received by the sheriff.

*Martin*, (Attorney-General.) He knew the Judges of General Court held themselves bound by the supposed decision in the case of *Kelly vs. Greenfield*. He therefore deemed it needless to instruct his client to have his possessions located on the plots. In the case of *Tasker vs. Whittington*, 1 *Harr. & McHen.* 151, the Provincial Court decided, that the Proprietary was not barred by adverse possession. Similar decisions, he is satisfied, often took place in the Courts of the Province, if the question was raised. See *Lord Baltimore's Ex'x vs. Huett*, 4 *Harr. & McHen.* 482.

\* The Court of Appeals, at June Term, 1804, affirmed the  
**98** judgment of the General Court, concurring with that Court in the opinions expressed in both of the bills of exceptions.

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## GENERAL COURT, (E. S.) SEPT. TERM, 1800.

### FRAZIER *vs.* HYLAND.

Where A. being indebted to B. for goods sold on a credit, for which, according to the custom of merchants, interest was to be charged, and A. afterwards pays the amount of the principal without directing how it was to

be applied, such payment is to be applied first to the discharge of the interest due, and then the balance to the discharge of the principal. (a)

ASSUMPSIT for money due for goods, wares and merchandises, sold by the plaintiff to the defendant. The plaintiff was a merchant of Baltimore, and the defendant a retail merchant of Somerset County. It was admitted, on the part of the defendant, that it was the custom of the merchants of Baltimore, when retail merchants in the country bought goods of them, on credit, after the expiration of six months credit, to charge interest on the principal sum due for such goods, calculating such interest from the expiration of the said six months. It appeared in evidence, that the plaintiff had drawn an order on the defendant for 220*l.* the amount of the sale of said goods, and of the interest charged, according to the admitted custom of charging it. The defendant refused to accept the order; but on a subsequent meeting of the plaintiff and defendant, the latter agreed to accept an order for 198*l.* that being the principal due, without interest. From this it appeared, that the only subject of dispute was the claim of interest.

*J. Bayly*, for the defendant, moved the Court to direct the jury, that if they should be of opinion from the evidence, that the principal sum was paid, the action could not be sustained for the interest.

THE COURT said, that as there was no evidence of the application of the payment, they would direct the jury that the payment in such case was to be applied, first to the discharge of the interest due, and then the balance to the discharge of the principal. Verdict for the plaintiff.

\* *Hammond* and *Harper*, for the plaintiff. *Martin*, (Attorney-General,) *Key*, and *J. Bayly*, for the defendant.

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GENERAL COURT, (E. S.) SEPT. TERM, 1800.

THE STATE *vs.* NEGRO BEN.

A person convicted of murder may be sentenced by the Court to work and labor on the public roads, &c. being one of the crimes of felony enumerated in the 10th section of the Act of 1793, ch. 57.

INDICTMENT for murder. The prisoner had been tried and found guilty, and was now brought before the Court to have sentence passed upon him. The Court were proceeding to pass the sentence under the 13th section of the Act of 1793, ch. 57, to wit: that he

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(a) See *Gwinn vs. Whittaker*, *post*, m. p. 754, *note*.

should labor on the public roads of Baltimore County for fourteen years; but

*Martin*, (Attorney-General,) informed the Court, that he believed, that that sentence could not legally be passed upon the prisoner, murder not being one of the crimes enumerated in the 10th section of that Act.

THE COURT seemed to think, that as the Act says, "any felony with or without benefit of clergy," murder being felony, must of course be included.

But the Attorney-General contended, that murder was not such a felony as was there meant, and that a pardon of all felonies would not pardon murder.

THE COURT thought proper to take time to consider the objection, and remanded the prisoner to gaol.

The prisoner being, on the next day, brought again before the Court,

CHASE, Ch. J. observed, that the Court had considered the objection made yesterday to the judgment they were about to pass, and remained of the same opinion, to wit: That murder was a felony within the meaning of the Act of 1793, and that therefore the prisoner's case was within that Act. It was therefore adjudged, that he should labor on the public roads of Baltimore County for the term of fourteen years.

## 100 \* GENERAL COURT, OCTOBER TERM, 1800.

CARROLL *et al.* Lessee *vs.* E. & S. NORWOOD.

A tenant in common of an undivided tract of land cannot convey his moiety by courses and distances.

A deed for part of a tract of land cannot be read in evidence, if defence is taken on warrant, unless such deed, and the courses therein described, are located on the plots. (a)

EJECTMENT, with seven separate demises, for a tract of land called Yates his Forbearance, lying in Baltimore County. The defendants took defence on warrant, and plots were made.

The plaintiff at the trial, offered in evidence to the jury a deed from George Yates to John Israel, dated the 5th of July, 1712, for a moiety of the tract of land for which the ejectment was brought,

(a) See the Act of 1882, c. 372.

which moiety was described in the said deed by courses and distances. The whole of which said tract had been devised to the said George Yates, and one John Yates, in fee, as tenants in common.

*Ridgely* and *Mason*, for the defendants, objected to the said deed being given in evidence to the jury, because as it conveyed only a moiety of the tract of land, the said moiety ought to have been delineated on the plots returned in the cause.

*Martin*, (Attorney-General,) and *Key*, for the plaintiff, contended, that as the plaintiff was in possession of the whole tract under sundry conveyances, &c. which were produced, it was unnecessary to locate upon the plots a part of the said tract conveyed by any particular deed, although such deed may describe the same by courses and distances.

CHASE, Ch. J. Can a tenant in common of an undivided tract of land convey his moiety, describing the same by courses and distances? No. But if there had been a division, and he conveys by expressions, the deed must be located on the plots.

On motion of the plaintiff's counsel, leave was given by the Court to amend the plots; for which purpose a juror was withdrawn, &c. and the cause continued until next term, on payment of the costs of this term by the plaintiff.

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\* GENERAL COURT, OCTOBER TERM, 1800. 101

THE STATE, use of PINKNEY *vs.* GOLDSMITH'S Adm'r.

A judgment against an executor, &c. "to bind assets which are or have been in hand," &c. is nothing more than a judgment, when assets, and a *fi. fa.* cannot issue thereon until after a *fiat* on a *sci. fa.* suggesting assets, &c.

In this case a judgment was entered at May Term, 1799, for the penalty of the bond and costs, to be released on payment of a particular sum, with interest and costs, with the following agreement: "This judgment to bind assets which are or have been in hand, and future assets as they arise, and which may be subject to this judgment in a legal course of administration." The plaintiff sued out a *fi. fa.* upon the judgment, returnable to this term, and there not being any property of the intestate to be found, the sheriff laid the *fi. fa.* on the property of the administrator, to the amount of the costs.

THE COURT, on motion of the defendant by his attorney, ordered the sheriff to correct his return, and the sheriff's return was accordingly corrected to *nulla bona*.

*Johnson*, for the plaintiff.

*Shaafl*, for the defendant.

NOTE.—The judgment was considered as a judgment of assets *in futuro*; and that there should have been a *scire facias*, suggesting assets, if any had come to, or were in the hands of the administrator.

## GENERAL COURT, OCTOBER TERM, 1800.

### M'KIM *vs.* MARSHALL.

A defendant, taken in execution on a *ca. sa.* was discharged on his producing his release under an insolvent law of another State.

HARRISON *vs.* YOUNG, *note*:

Bail discharged on evidence being produced of the release of the principal under the insolvent law of another State.

CA. SA. upon a judgment rendered in this Court at May Term, 1800. The sheriff returned the writ *cepi*, and brought the defendant into Court. The defendant produced to the Court his discharge under the insolvent law of Pennsylvania, since the cause of action accrued in this case.

**102** \* THE COURT admitted such discharge to be legal, and the defendant was released from the execution. (*a*)

*Winchester*, for the plaintiff.

*Mason*, for the defendant.

## GENERAL COURT, OCTOBER TERM, 1800.

### STEVENSON *vs.* MYERS.

On the execution of a commission to take the depositions of witnesses, in answer to one of the interrogatories, a witness stated that in his opinion

(*a*) In the case of *Harrison vs. Young*, at May Term, 1788, a similar decision appears to have been given. In that case a *non est* was returned upon a *ca. sa.* issued upon a judgment rendered in this Court. The special bail of the defendant suggested to the Court, that the defendant was a citizen of the State of Pennsylvania, and had complied with the laws of that State relative to bankrupts and bankruptcies, and obtained a certificate of such conformity, and an allowance of the said certificate by the president of the said State, pursuant to the said laws; all which appeared to the Court by the record of the proceedings produced.

HARRISON, Ch. J. and GOLDSBOROUGH, J. decided, that the special bail in the action, was by such certificate discharged from his undertaking for the defendant.

*Ridgely*, for the plaintiff.

*Martin*, (Attorney-General,) for the special bail.



his deposition taken at another time contained his knowledge, &c. Which deposition was set forth by the commissioners—*Held*, that it was incompetent, and could not be read in evidence. (a)

DEBT upon a writing obligatory. The defendant pleaded general and special *non est factum*.

The plaintiff, at the trial, offered to read in evidence to the jury, the answer of Andrew Hayner, to the plaintiff's fourth interrogatory, annexed to a commission issued in this cause to take depositions, and therewith returned to this Court, to wit: "Interrogatory the 4th. Declare your whole knowledge touching and concerning the said bond, and the execution thereof by the said Myers, and relate every circumstance touching the same in a full and complete manner."

"To the fourth interrogatory he answereth and saith, that in his opinion his deposition taken before John Hunter, Esquire, of Hancock Town, Washington County, Maryland, contains his knowledge fully, (as to the fourth interrogatory;) which deposition is in the following words, viz. The deposition of Andrew Hayner, \* aged about 38 years, being first duly sworn," &c. copying the said deposition. **103**

But the Court [CHASE, Ch. J. and DUVALL, J.] were of opinion, that the same was incompetent, and could not be read in evidence, and refused to permit the same to be read to the jury. The plaintiff excepted.

*Key* and *Harper*, for the plaintiff.

*Martin*, (Attorney-General,) and *Shaff*, for the defendant.

#### GENERAL COURT, OCTOBER TERM, 1800.

CAWOOD vs. WHETCROFT, Adm'r of HANSON.

The Act of Limitations is a bar to an action brought within one year after a former action had been struck off. (b)

THIS was an action of *assumpsit*. The writ issued on the 11th of January, 1797, and the declaration contained sundry counts. The defendant pleaded several pleas, and amongst other, *non assumpsit intestatoris infra tres annos*. The plaintiff replied to this plea, that he did, within three years after the cause of action accrued, to wit, on the 1st of March, 1784, for the recovery of the damages, &c. prosecute a writ of *capias ad respondendum* out of Charles County Court, against the intestate, and the proceedings in the said action were set out, shewing that the same was referred to arbitrators in

(a) See *Evans' Pr.* 337.

(b) See *Alex. Br. Stat.* 464; *Evans' Prac.* 188.

1786, and that no award being returned, it was at the instance of the plaintiff, by order of the Court, struck off in August, 1796, and that the present suit was brought within one year afterwards, to wit, on the 11th of January, 1797. The defendant demurred to the replication; And

The General Court ruled the demurrer good; and gave judgment for the defendant.

*Martin* (Attorney-General,) and *Ridgely*, for plaintiff.

*Kilty* and *Shaafl*, for defendant.

## 104 \* GENERAL COURT, OCTOBER TERM, 1800.

### BULLEN's Adm'r *vs.* RIDGELY's Ex'r.

The Act of Limitations need not be pleaded to each distinct count in a declaration containing several counts upon several distinct causes of action.

(a)

ASSUMPSIT. The declaration contained sundry counts for the value of a horse delivered by the plaintiff's intestate to the defendant's testator, which he promised to return, and which he did not, &c.

The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*. The plaintiff demurred specially to the 2d and 3d pleas; and in the demurrer to the 2d plea, assigned for causes the following: "Because, in some counts in the declaration, to wit, the 1st and 2d, the cause of action does not accrue on the promise and assumpsit of the testator, but on matter subsequent; therefore the said plea, going to the whole declaration, is immaterial and vicious, as to the counts aforesaid; and that the said plea is uncertain and wants form."

The causes assigned in the demurrer to the 3d plea are as follow: "That the said plea is uncertain in this, that the declaration consists of many counts, and of many distinct causes of action, and the said plea is pleaded to the cause of action in the declaration, without naming and specifying to which cause of action the said plea is to apply; and wants form," &c.

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(a) This case is commonly cited in support of the rule deduced from it in the above syllabus. 1 *Poe's Pldg.* 521; *Evans' Prac.* 183. It does not appear, however, whether judgment was given for the defendant because the pleas demurred to were good, or because the Court, mounting to the first error, found the declaration bad. In *Edwards vs. Bruce*, 8 Md. 387, it was said that decisions in which no opinions were filed, will not be regarded as authority in other cases, unless the similarity is so apparent as to leave scarcely a doubt in regard to the propriety of applying the principles clearly shown to have been necessarily involved in, and settled by, the questions actually decided.

*Shaff*, for the plaintiff, contended, that the causes of action accrued subsequent to the promises, and that *actio non accrevit* was the proper plea, and should go to each distinct count; if not, upon a special demurrer, the plea is bad. He produced a number of forms from the books to shew, that where there were several counts, the plea was to each distinct count, or the several causes of action in the declaration.

*Ridgely and Hollingsworth*, for the defendant.

The General Court overruled the demurrers, and gave judgment for the defendant.

• GENERAL COURT, OCTOBER TERM, 1800. 105

HUGHES *vs.* CHRISTIE.

The plea of general performance may be withdrawn for the purpose of pleading *non est factum*. (a)

ACTION of debt on a bond with a collateral condition. The defendant pleaded general performance. and the cause was standing on the trial docket under a rule replication.

*Johnson*, for the defendant, moved for leave to withdraw the plea of general performance for the purpose of pleading *non est factum*.

*Martin*, (Attorney-General,) for the plaintiff.

Leave granted by the Court.

COURT OF APPEALS, NOV. TERM, 1800.

COLSTON *vs.* NICOLS.

To prove that a person offered as a witness was interested in the event of the cause, evidence was offered to prove that he had declared that he was interested, &c. Held, that the evidence was admissible to impeach the competency of the person offered as a witness. (b)

(a) But in *Union Bank vs. Ridgely*, 1 H. & G. 407, it was held, (following *Stephen on Pleading*, c. 2, s. 3, R. 1,) that, notwithstanding the apparent repugnancy between the pleas of general performance and *non est factum*, they might both be pleaded; and that the only pleas now disallowed on the mere ground of inconsistency are the general issue and tender. By Statute of 4 Ann. c. 16, and Rev. Code, Art. 64, s. 72, several pleas are allowed when consistent. See *Alex. Br. Stat.* 666.

(b) Overruled by *Stimmel vs. Underwood*, 3 G. & J. 282, where it was held that evidence of the unsworn declarations of a witness was inadmissible to impeach his competency. See Rev. Code, Art. 70, s. 1, as to the competency of witnesses.

**WRIT OF ERROR.** The defendant in error, brought an action of *trespass q. c. f.* in the General Court, for the Eastern Shore, for a trespass, committed on a tract of land called Cumberland, lying in Talbot County. The general issue was pleaded.

The plaintiff at the trial, to support the issue on his part, offered to swear a certain John Valliant as a witness, but the defendant, (now plaintiff in error,) objected to the said Valliant being sworn, alleging him to be interested in the event of the cause, and offered to swear another witness, to prove that the said Valliant declared to him that he was interested in the event of the suit, and to pay a part of the costs of the suit in case the plaintiff lost the cause.

But the General Court, (GOLDSBOROUGH, Ch. J., CHASE and DUVALL, JJ.) were of opinion, that such testimony was inadmissible, and refused to let the witness be sworn to impeach the competency of the said Valliant. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant brought a writ of error to this Court.

\* *Key*, for the plaintiff in error.

**106** *Martin*, (Attorney-General,) for the defendant in error.

The Court of Appeals at this term, reversed the judgment of the General Court.

## COURT OF CHANCERY, FEB. TERM, 1801.

### WHITE vs. CASANAVE's Heirs *et al.* (a)

If a conveyance is made of land, and a bond taken for the purchase money, and the purchaser dies without having paid the purchase money, and the land is decreed to be sold for the payment of the debts of the deceased, the vendor is entitled to a preference in the payment of his debt. (b)

THE bill in this case, (filed on the 5th of January, 1799,) amongst other things stated, that on the 30th of July, 1794, the complainant contracted with Peter Casanave, for the sale of a tract of land, then belonging to him the complainant, called Mill Seat, containing 75 acres, for the sum of 10*l.* per acre; that the said Casanave did on

(a) There were sundry other bills filed by Beall, Dorsey, Deakins and others, claiming like preferences for other lands sold and conveyed, but not paid for, and decrees were passed similar to that which took place in the present case.

(b) As to the lien of a vendor on the land sold as a security for the unpaid purchase money, and as to the waiver of such lien, see *Schwartz vs. Stein*, 29 Md. 112; *Tuck vs. Calvert*, 33 Md. 209; *Hall vs. Jones*, 21 Md. 439; *Carr vs. Hobbs*, 11 Md. 285; *Schnebly vs. Ragan*, 7 G. & J. 120; *Roberts vs. Salisbury*, 3 G. & J. 425.

the said day execute to the complainant a bond for the payment of the purchase money of the said land; that the said Casanave never made any payment of any part of the purchase money for the land, nor gave to the complainant any bond, or other security, for the said purchase money, other than the above mentioned bond. That the said Casanave, representing to the complainant that he wished for a conveyance, and was ready to make a payment of the purchase money, and under an expectation that such payment would be made before the deed was recorded, the complainant did on the 26th of June, 1795, convey to the said Casanave the land aforesaid, by deed of that date. That the said Casanave, so having obtained from the complainant a conveyance for the said land, died intestate, leaving two children, Joane and Peter Casanave, both infants, and that Anne Casanave, his widow, and Nicholas Young, have taken out letters of administration on the personal estate of the said Peter Casanave. That the said Casanave was much involved in his circumstances, and died insolvent \* as to his personal estate, which has already been exhausted in the payment of his 107 debts, and that a bill was filed in the Court of Chancery by William Deakins, &c. as creditors of the said Casanave, for the sale of his real estate, and that Court passed a decree on the 28th of June, 1798, for the sale of the real estate of the said Casanave, by which a certain Samuel Brooke is appointed trustee; that the said Brooke, by virtue of the power reposed in him by the said decree, has advertised for sale the real estate of the said Casanave, and with the rest, the said land called Mill Seat, &c. Prayer, that the complainant may be first paid the purchase money of the land in the deed aforesaid mentioned, in preference to the other creditors, out of the sales of the said land; and for such other relief, &c.

*Shaaff*, for the complainant. The question is, Whether if a conveyance is made of land, and a bond taken for the purchase money, the land can be pursued in the hands of the party, his heirs, or a purchaser, without notice? If a person sells land, and the vendee becomes bankrupt before the payment of the purchase money, the vendor has a lien on the land for the payment of the purchase money, although nothing is said specially about it. 1 *Vern.* 267; *Fonbl. Eq.* 374. If a man sells land, and makes a conveyance of it, and the money is not paid, as against the vendee, his heirs, or any claiming under him with notice of this equity, the land may be resorted to. 2 *Ves.* 622; 2 *Eq. Ca. Ab.* 682; 3 *Atkyns*, 273; 2 *Vern.* 281; *Amb. Rep.* 724; *Brown's Cha. Ca.* 420; *Ridgely vs. McKenna's Ex'r*, 4 *Harr. & McHen.* 167; *Fonbl.* 143.

\* HANSON, C. decreed, that the complainant should have a preference agreeably to the prayer contained in his bill. 109

## GENERAL COURT, (E. S.) APRIL TERM, 1801.

GLASSGOW'S Adm'r vs. PORTER *et al.*

The Act of Limitations does not begin to operate until the expiration of the time limited for the payment of the money secured to be paid by the bond, &c. (a)

Two actions of debt on two bonds, dated the 2d of March, 1771, one of them payable the 1st of May, 1777. The writs issued on the 21st of January, 1793. The defendants pleaded the Act of Limitations. Replications, the intestate and administrator beyond seas, viz. in Pennsylvania.

*Harper*, for the defendants, contended, that the Act of Limitations operated from the date of the bond, and not from the time of payment. He cited the Act of 1715, ch. 23, s. 6, which declares that no bond shall be good and pleadable, or admitted in evidence, after the principal debtor or creditor have been both dead twelve years, "or the debt or thing in action above twelve years standing"—meaning, he contended, the debt or thing in action created by the bond.

CHASE, Ch. J. The Court are of opinion, that the Act of Limitations does not begin to operate until the expiration of the time limited for the payment of the money.

*David, Alexander, and Jas. Scott*, for the plaintiff.

*Key, Harper, and Barroll*, for the defendants.

## GENERAL COURT, MAY TERM, 1801.

## FORBES vs. PERRIE'S Adm'r.

A promise by an administrator to pay a debt of his intestate is binding, if there be assets, and he may be sued, as administrator, in *assumpsit*, on such promise. (b)

(a) Approved in *Thruston vs. Blackiston*, 38 Md. 510, where it was held that a trustee's bond is within the Act of 1715, c. 23, s. 6, (Code, Art. 57, s. 3,) and that limitations thereon begin to run only from the time when a breach of the condition of the bond occurs. Cf. *Hall vs. Creswell*, 12 G. & J. 36.

(b) Recognized in *Pole vs. Simmons*, 49 Md. 20, and in *McCann vs. Sloan*, 25 Md. 586. An administrator's promise to pay, or acknowledgment of, a debt due by his intestate removes the bar of the Statute of Limitations. *Pole vs. Simmons*, *supra*. As to when retaining a sum of money to meet a claim, will amount to an acknowledgment, see *Semmes vs. Young*, 10 Md. 242; *Pole vs. Simmons*, *supra*. A promise by one of two administrators will remove the bar of the statute as against both, provided the existence of the claim be established by proof *aliunde*. *McCann vs. Sloan*, *supra*.

Where one party demurs to the evidence offered by the other, the Court will not compel such other party to join in the demurrer. (a)

There can be no demurrer to parol evidence, unless the parties can agree upon the facts.

The defendant, being indebted to the plaintiff, gave to the attorney of the plaintiff, sundry bonds, to be put in suit for the use of the plaintiff, and the money received thereon to be applied to the discharge of the debt due by the defendant. Judgments were obtained on the bonds, but the plaintiff prevented a *fi. fa.* from being laid on one of the judgments. *Held*, in an action for the original debt, that the defendant was not entitled to a credit for the amount of the judgment, which was not collected by reason of the plaintiff's interference; that the plaintiff's attorney, who received the bonds from the defendant, became the agent of both parties, and that the plaintiff had no authority to interfere with the collection of the money due on the said bonds.

Where an administrator files as an exhibit in a Chancery suit, an account against his intestate in favor of A. it is a sufficient acknowledgment of such account to prevent the operation of the Statute of Limitations, and one who is the attorney of both the administrator and A. is competent to prove that the administrator directed such account to be used as an exhibit, and insisted on in such suit.

**ACTION of *assumpsit*.** The declaration contained sundry counts; one was, that the intestate being indebted to the plaintiff, on the 1st of March, 1793, in the sum of 1,121*l.* 10*s.* 3*d.* current money, for sundry \* matters, &c. the administrator, in consideration thereof, on the 1st of April, 1798, undertook, &c. Another **110** count on an *insimul computasset* between the administrator and the plaintiff and his promise to pay, &c. See 1 *Harr. Ent.* 161, 162, 179. *Non assumpsit* and limitations pleaded. General replications, and issues joined.

1. *Shaaff*, for the defendant, contended as to the count upon the assumption by the administrator, that if the administrator did assume, yet the action was brought wrong, being against the defendant as administrator. 1 *Ventris*, 268; 2 *Lev.* 122.

*T. Buchanan*, for the plaintiff. The administrator promises, in his capacity of administrator, and the action can only be against him as such. 7 *T. R.* 182; 1 *Salk.* 208; 1 *H. Blk. Rep.* 102; *Beard vs. Cowman*, 3 *Harr. & McHen.* 152.

**CHASE, Ch. J.** The Court are of opinion, that the promise made by the administrator is binding, (if there are assets,) and the action is well brought.

(a) Demurrers to evidence have fallen into disuse. *Alex. Br. Stat.* 128. In their place is used a prayer that the evidence of certain facts being legally insufficient, the verdict of the jury must be for the defendant, &c. *Clarke vs. Dederick*, 31 *Md.* 148. When a prayer is intended as a demurrer to the evidence, it must point out some particular error or omission in the proof. A prayer "that there is no sufficient evidence to entitle the plaintiff to recover," is too general. *Reier vs. Strauss*, 54 *Md.* 291.

2. The defendant demurred to the evidence offered to the jury on the part of the plaintiff.

The plaintiff, (for that he had shewn in evidence to the jury sufficient matter to maintain the two last issues joined on his part to the pleas of *non assumpsit infra tres annos*, by the defendant, as to the 5th and 6th counts in the declaration, and from which evidence the jury might infer an assumpsit within three years next preceding the impletration of the original writ in this cause,) refused to join in demurrer to the evidence, unless the defendant would admit the fact on record, that he did, within three years before the institution of this suit, promise to pay to the plaintiff the sum of money, to recover which this action is brought; which the defendant refused to do.

Whereupon the plaintiff prayed the Court not to compel him to join in the said demurrer to evidence.

\* For which were cited 1 *Morg. Ess.* 448; *Viner's Abr.* 261; **111** *Doug.* 119, 224; *Prac. Reg.* 83; 5 *Co.* 104; *Dyer*, 53; *Bull. N. P.* 316; 2 *H. Blk. Rep.* 187; *Pasch.* 23, 114, 115, 166; *Reg. Plac.* 129.

CHASE, Ch. J. The Court are of opinion, that the plaintiff cannot be compelled to join in the demurrer to evidence. Unless the parties can agree upon the facts, there can be no demurrer to parol evidence. The defendant excepted.

3. The defendant offered evidence to the jury, going to prove, that P. B. Key, Esquire, an attorney of this Court, and who had conducted the business of the plaintiff in particular Courts, had the claim (to recover which this suit is brought,) of the plaintiff against the defendant, as administrator of his father, to collect, or bring suit thereon. That he received from the defendant sundry bonds payable to the defendant for money due to him, and gave a receipt for the said bonds, stating that they were to be put in suit for the use of the plaintiff, and the money, when received, to be applied in discharge of the debt due from the defendant as administrator aforesaid to the plaintiff. That suits were brought upon the said bonds for the use of the plaintiff, judgments obtained, and executions issued thereon, and sent by the attorney to the plaintiff; that the plaintiff, relying on the promise of one of the defendants, against whom a *fi. fa.* had issued, prevented the same being laid.

The defendant prayed the opinion of the Court, and their direction to the jury, that if they were of opinion, from the evidence given in this cause, that the plaintiff by his own act prevented the sheriff from receiving the money upon the said *fieri facias*, when the sheriff, without his interference could and would have received the same upon the said *fi. fa.* that then the defendant is entitled to a credit for the amount of the said debt.

CHASE, Ch. J. The Court are of opinion, that according to the receipt signed by P. B. Key, Esquire, the said Key was the agent



of the defendant and the \* plaintiff, and that the bonds were deposited in the hands of the said Key by the defendant, for collection, and the money, when received by the said Key, was to be paid over by him to the plaintiff, and applied to the discharge of the debt due from the defendant to the plaintiff, and that the plaintiff had no power or authority to interfere in the collection of the money due on the said bonds; but that the same were intrusted to the sole direction and management of the said Key. The Court refuse to give the direction to the jury as prayed by the defendant. The defendant excepted.

4. The plaintiff proved to the jury, that the defendant's intestate was the executor of a certain C. S. Smith, and the guardian of his children, and after the death of the said Smith, possessed himself of his real and personal estate, and contracted a debt with the plaintiff on behalf of the children of the said Smith, for the articles charged in the account upon which this suit is brought (a,) and afterwards acknowledged the said account to be just, and promised payment thereof to the plaintiff. That one of the representatives and devisees of the said Smith filed a bill in the Court of Chancery against the said intestate, among other things, for an account of the real and personal estate, of the said Smith, to which bill the said intestate by P. B. Key, Esquire, his solicitor, put in his answer; which bill and answer were offered in evidence. That the said intestate, in the said suit in Chancery, produced and exhibited the account before referred to, and claimed a credit against the said representative in discharge of his claim against him the said intestate, for the amount of the said account; that the said account had been sent by the intestate to the said Key, to be produced and exhibited as a voucher and claim, in the said suit in Chancery, against the said representative, and that the said Key did accordingly, at the request and by the direction of the intestate, exhibit the said account in the said suit as a claim and voucher as aforesaid. That on the death \* of the intestate, the defendant took out letters of administration on his estate. That the plaintiff employed the said Key as his attorney, to recover the said account from the defendant, as the administrator of the intestate. The defendant offered to prove, that he, as administrator aforesaid, employed the said Key to appear for and manage the said suit in Chancery on his behalf. The plaintiff then offered to prove by the said Key that, after he had been employed as aforesaid by the said plaintiff and defendant, he applied to the defendant for payment of the said claim due from the defendant's intestate to the plaintiff, as before mentioned, as well as for another claim due from the said intestate to the plaintiff; and that the defendant told and directed the said Key to insist upon the said account being allowed

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(a) There were two suits upon two separate accounts between the parties.

against the said representative of the said Smith in the said suit in Chancery, in the same manner that his father, the intestate, had done; and delivered to the said Key the bonds before referred to, to be sued for the use of the plaintiff, and the money, when received, to be applied to the payment of the claim of the plaintiff against the said intestate; which bonds were applied to a different account, and not to the account before referred to. The defendant objected to the said testimony being given by the said Key.

CHASE, Ch. J. The Court overrule the objection, and permit the evidence of Mr. Key to be given to the jury. The defendant excepted. Verdicts and judgment for the plaintiff.

*Martin*, (Attorney-General,) *Johnson* and *T. Buchanan*, for the plaintiff. *Shaaff* and *Mason*, for the defendant.

# 114 \* GENERAL COURT, MAY TERM, 1801.

## ONION *vs.* PAUL.

A. being indebted to B. upon an open account, B. assigns the same to C. of which A. had notice, and promised to pay C. *Held*, that C. could recover the amount in an action of *assumpsit*; and that it was not necessary that the assignment should be in writing, or that it should be produced in Court. (a)

ASSUMPSIT. The counts in the declaration were for sundry articles properly chargeable in an account; for the use and occupation of a mill; *indebitatus assumpsit* for a mill sold; and an *assumpsit* to Zaccheus Onion for sundry articles, &c. and which was assigned by the said Zaccheus Onion to the plaintiff, &c. The account exhibited with the declaration, contained amongst other charges the following, viz.

"To an assignment from Zaccheus Onion to me 6th

March, 1795, as follows, to wit:

"To one-half upper mill rent from 22d March, 1786, to  
the 22d March, 1787,

£92 10 0

"To 11 years interest on the same,

56 1 0

"To one-half upper mill rent from 1787," &c. &c.

(a) Approved in *Lamar vs. Manro*, 10 G. & J. 64. And so in *Allstan vs. Contee*, 4 H. & J. 351, it was held that the assignee of an open account debt may, under certain circumstances, support an action of *assumpsit* thereon, in his own name against the debtor. Cf. *Barger vs. Collins*, 7 H. & J. 213. The person to whom a *chase in action* has been assigned *in writing*, under Code, Art. 9, s. 1, need not aver that the defendant promised to pay the same, nor that he is the *bona fide* assignee. *Stewart vs. Rogers*, 19 Md. 115; *Crawford vs. Brooke*, 4 G. 213. As to cases not within Code, Art. 9, s. 1, see *Gordon vs. Downey*, 1 G. 41. The case in the text is cited in *Tiernan vs. Jackson*, 5 Peters, 598.

The defendant pleaded the general issue.

1. At the trial the plaintiff gave in evidence, that the defendant acknowledged that he owed to a certain Zaccheus Onion a sum of money charged against the said John Paul, in the said account filed, and that he had assumed to pay the same to the plaintiff. The defendant, by his counsel, applied to the Court for their opinion, and direction to the jury, that the debt due from the defendant to the said Zaccheus Onion, was no consideration to support the promise made to the plaintiff, even though an assignment had been previously made of the said debt to the plaintiff by the said Zaccheus; and further, that even if such assignment was made, there must be other proof thereof than merely the promise to pay the debt.

DUVALL, J. (DONE, J. concurring. CHASE, Ch. J. did not attend.) The Court are of opinion, and so direct the jury, that if they should be of opinion from the evidence in this cause, that a debt due on an open account existed from the defendant to Zaccheus Onion, and so being due, was assigned by the said Zaccheus Onion to the plaintiff, and that the \* defendant had notice of such assignment, and so having notice, the defendant promised to **115** pay the plaintiff the amount thereof, then the plaintiff is entitled to recover; and that the promise alone, without an assignment or transfer and notice thereof, is not sufficient to entitle the plaintiff to recover. The defendant excepted.

2. The plaintiff gave in evidence to the jury, that the defendant owed the money mentioned in the account to Zaccheus Onion, who assigned the debt to the plaintiff—that afterwards the defendant assumed to pay the same to the plaintiff. Whereupon, the defendant prayed the Court for their opinion and direction to the jury, that it was necessary for the plaintiff, to support his action thereon, that the assignment should have been in writing, and that it should be produced in Court.

DUVALL, J. The Court are of opinion, that it is not necessary for the plaintiff, to support his action thereon, that the assignment should have been in writing, or that it should be produced in Court. The defendant excepted. The verdict was for the defendant.

*Key and Johnson*, for the plaintiff.

*Martin*, (Attorney-General,) *Brice and Kell*, for the defendant.

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#### GENERAL COURT, MAY TERM, 1801.

##### HOWARD'S Lessee *vs.* CROMWELL.

The person to whom a special warrant of resurvey is issued, and his assigns, acquire an equitable interest in the vacant land contiguous to the land

described in the warrant, and a patent issued on such warrant relates to the date thereof as to such contiguous vacancy; but no title is acquired by such warrant and patent to vacant land separated from the original tract by an elder survey, and included in another grant, subsequent to the date of the said warrant (a)

It is the province of the jury to determine, from the evidence, the true location of the tracts of land in dispute, and whether there was any vacancy between the same. (b)

It is the province of the jury, to determine whether any allowance be made for the variation of the compass, and the rate or rule of such allowance. (c)

Leave given to the defendant to narrow the defence taken on the plats, on payment of costs. (d)

EJECTMENT for three tracts of land lying in Baltimore County, viz: Howard's Inheritance Resurveyed, Water Oak Ridge, and Roseland. The defendant took defence upon a warrant, and plots were returned. At this term the defendant gave "notice of a motion  
**116** \* for leave to ascertain and narrow his pretensions and defence on the payment of such costs, as shall be ordered and adjudged to be paid by the defendant to the plaintiff." The leave was granted on the payment of all costs to this time, (20th of May, 1801,) except the attorney's fee, and sheriff's fee for serving a copy of the declaration in ejectment. The defendant took defence for the tract of land called Wester Ogle, as located on the plots in red dotted lines; for the tract of land called Addition to Simpkins' Repose, located in green lines; and for the tract of land called Ising Glass Glade Enlarged, in blue lines.

It was agreed between the parties that this case did not depend upon the location of the first seven lines of Wester Ogle, but that the true location thereof lays that land clear of the lines of the land called Mount Organ. It was also agreed, that the defendant claimed no part of the land called Howard's Inheritance Resurveyed, as located on the plots, as included within the lines of Wester Ogle.

1. The plaintiff at the trial offered in evidence to the jury, a common warrant issued to Thomas Wells, on the 4th of August, 1752, for 60 acres of land, he having paid 3*l.* sterling caution for the same; also an assignment of the said warrant to Cornelius Howard, on the 22d of January, 1753; also a certificate of survey made in virtue of the said warrant on the 30th of January, 1753, for 38 acres of land,

(a) See *Howard vs. Cromwell*, 4 H. & McH. 325. In *Steyer vs. Hoyer*, 12 G. & J. 202, it was held that no land can be taken up under a warrant of resurvey as vacancy, but that, which lies adjacent to the tract resurveyed. It may extend to the lines of other tracts, but not beyond, or over them. Cf. *Hammond vs. Warfield*, 2 H. & J. 151; *Hammond vs. Norris*, *Ib.* 130; *Hoyer vs. Johnston*, 2 G. 291.

(b) See *Dorsey vs. Hammond*, *post*, m. p. 190.

(c) Affirmed in *Harlan vs. Brown*, 2 G. 430.

(d) See Code, Art. 75, s. 57; *Cheney vs. Watkins*, *post*, 295.

and called Water Oak Ridge; also a patent granted on the said certificate on the 6th of March, 1753, to Cornelius Howard, father of the lessor of the plaintiff; and the plaintiff also offered in evidence to the jury, that the composition money for the land included in the certificate and patent aforesaid, was paid on the day of issuing the said warrant, and that the said certificate was examined and passed on the said 6th of March, 1753.

The defendant then offered in evidence to the jury, a special warrant of resurvey issued on the 28th of November, 1751, to John Medcalf, to resurvey two tracts or parcels of land lying and being in Baltimore \* County, and contiguous to each other, viz: Rich Level and Medcalf's Addition, and to add contiguous vacancy, **117** &c. That the said warrant was renewed on the 13th of May, 1752, for six months, and again on the 18th of November, 1752, for six months longer, and was executed on the 20th of January, 1753, and a certificate of survey returned to the land office for 720 acres of land, and called Wester Ogle.

[The certificate states Rich Level to contain 100 acres, and Medcalf's Addition to contain 102 $\frac{3}{4}$  acres, 46 acres part whereof lay within the bounds of a tract called Mount Organ, and 14 $\frac{3}{4}$  acres within Spring Garden, and that 578 acres of vacant land were added.]

That the said certificate was caveated by the said Cornelius Howard on the 21st of April, 1753; that the said caveat was overruled on the 17th of August, 1753, and patent ordered to issue on the said certificate. That the said certificate was assigned by the said John Medcalf to Doctor William Lyon on the 6th of August, 1753. That the said certificate was examined and passed on the 17th of August, 1753, the composition money paid on the 28th of September, 1753, and patent issued thereon to the said William Lyon on the 8th of February, 1754.

The plaintiff then offered in evidence to the jury, that the certificate of survey and patent of Wester Ogle aforesaid, comprehended within its lines and boundaries, vacant land not contiguous to Rich Level, or Medcalf's Addition aforesaid, but which, though vacant, was separated from the said tracts, by tracts of land granted antecedent to the issuing the warrant of resurvey aforesaid to the said John Medcalf, and that the lines in the said certificate and patent of Wester Ogle, crossed the said elder surveys, to include the vacancy included in the patent of Water Oak Ridge aforesaid.

Whereupon the defendant prayed the opinion of the Court, and their direction to the jury, that the title of the defendant to the land called Wester Ogle, and all land vacant at the time of the execution of the \* warrant of resurvey aforesaid, and included within the lines and boundaries thereof, commenced from the **118** 20th of January, 1753, so as to have a priority of title to the same vacancy which was included in the patent of Water Oak Ridge.

CHASE, Ch. J., (DUVALL and DONE, JJ. concurring.) The Court refuse to give the opinion and direction to the jury, as prayed by the defendant: But the Court are of opinion, and so direct the jury, that John Medcalf, by his special warrant of resurvey on the lands therein mentioned, acquired an equitable interest in the vacant lands contiguous thereto, from the date of the said warrant; and the patent which issued to Doctor William Lyon, to whom the said John Medcalf had assigned his certificate of survey on the said warrant, will relate to the date of the said certificate as to such adjoining or contiguous vacancy, and not to give title to any vacant land separated by an elder survey, and included in the patent of Water Oak Ridge. The defendant excepted.

2. The defendant prayed the opinion of the Court, and their direction to the jury, that if they the jury are of opinion, that the two tracts of land located on the plots returned in this cause, called Murray's Meadows, (surveyed the 27th of February, 1726,) and The Addition to Shiloh Completed, (surveyed the 25th of April, 1752,) located course and distance only, on the 20th of January, 1753, agreeably to the certificates thereof, lay clear of each other, that then it was lawful for the surveyor to go between the said tracts in order to include any adjoining vacant land, beyond them, in the certificate of resurvey for Wester Ogle.

CHASE, Ch. J. The Court are of opinion, that it is the province of the jury to determine and ascertain from the evidence adduced to them in this action, the true position and location of the said lands, and whether there was any vacancy intervening the said tracts; and

**119** that it is with the jury to decide on the propriety\* and justice of allowing, or not allowing the variation of the compass, and the rate or rule of such allowance, according to the evidence in the case. The defendant excepted. Verdict and judgment for all that part of Water Oak Ridge by him located and not included in the defendant's location of Addition to Simpkins' Repose.

The defendant appealed to the Court of Appeals, and the case was argued in that Court at November Term, 1803, by *Mason*, for the appellant, and by *Martin*, (Attorney-General,) and *Key*, for the appellee.

The Court of Appeals affirmed the judgment of the General Court, concurring with that Court in the opinions expressed in both bills of exceptions.

## GENERAL COURT, MAY TERM, 1801.

## HALL'S Lessee vs. GOUGH.

Where two deeds, one of a portion and the other of the residue of a tract of land, are offered in evidence in an action of ejectment, they are admissible, without being located, when the whole tract has been located. (a) The jury was instructed that they ought to presume that a patent was regularly issued, there having been a certificate of survey returned, and sundry conveyances and long possession by persons claiming thereunder. (b)

The Register of the Land Office examined as a witness as to the loss of records of his office, and as to certain practices which prevailed therein, prior to the Revolution.

EJECTMENT for a tract of land called Reprisal, lying in Baltimore County. Defence on warrant, and plots returned.

1. The plaintiff at the trial, to make title to the land in the declaration mentioned, offered in evidence to the jury a patent for the said land, granted to the lessor of the plaintiff, on the 17th of November, 1798, in virtue of a certificate of survey returned under a warrant of proclamation.

The defendant then produced and read in evidence to the jury, the certificate of a tract of land called Thompson's Choice, surveyed for James Thompson on the 12th of March, 1679, which is the same land mentioned in the said patent to the lessor of the plaintiff; and in order to prove that the whole of the said land called Thompson's Choice, was conveyed by James Thompson, for whom the said certificate was made, \* and by Arthur Thompson, the heir at law of the said James Thompson, produced and offered to **120** read in evidence to the jury two deeds, the one from the said James Thompson to Gabriel Parrott, for 200 acres, part of the said tract of land, dated the 4th of January, 1693, and the other from the said Arthur Thompson to Joseph Wilson, for the residue of the said tract of land, dated the 25th of August, 1702. The defendant also produced and offered to read in evidence to the jury, sundry deeds, which are hereafter more particularly described, from the said Parrott and Wilson, above mentioned, down to the present holders of the said land, for the whole of the said tract of land called Thompson's Choice.

To the reading of which two deeds the plaintiff objected, because the said deeds are not located on the plots returned in this cause.

DUVALL, J., (DONE, J. concurring; CHASE, Ch. J. did not attend.) The Court are of opinion, that the said deeds are admissible in evi-

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(a) See *Langley vs. Jones*, 26 Md. 473; *Pottinger vs. Hall*, 4 H. & McH. 349, and note; Act of 1882, c. 372; *Evans' Prac.* 283.

(b) See *Lloyd vs. Gordon*, 2 H. & McH. 254, note.

dence to prove that the whole of the tract of land called Thompson's Choice is covered and conveyed by the said deeds, although not located on the plots returned in this cause. The plaintiff excepted.

2. The plaintiff, to make title to the land in the declaration of ejectment mentioned, produced and read in evidence to the jury, a patent to the lessor of the plaintiff for the land in the declaration mentioned, dated the 17th of November, 1798, reciting, "that whereas Aquila Hall, Esquire, of Baltimore County, on the 11th day of May, 1797, obtained out of the Land Office for the Western Shore, a special warrant of proclamation, to resurvey and affect a tract of land called Thompson's Choice, lying in the county aforesaid, originally on the 12th of March, 1679, resurveyed for James Thompson, by virtue of the following warrants, to wit: a warrant for 550 acres, and a warrant for 250 acres, as appears by the certificate of the said survey, containing 1,000 acres, which said certificate had

not been compounded on as the law required: \* In pursuance  
**121** whereof a resurvey was made for and in the name of the said Aquila Hall, Esquire, and a certificate thereof returned to the said Land Office, containing 964 acres, called Reprisal; and he having, pursuant to law, paid to the Treasurer of the Western Shore the sum of 264*l.* 7*s.* 6*d.* being the full composition due for the said land and improvements thereon. The State of Maryland doth hereby grant unto the said Aquila Hall the said tract of land called Reprisal, lying in Baltimore County aforesaid, beginning," &c. "and containing and now laid out for 964 acres more or less, according to the certificates of resurvey taken and returned to the Land Office, bearing date the 28th of April, 1798," &c.

The defendant, in order to prove that the said land mentioned in the patent to the lessor of the plaintiff by the name of Thompson's Choice, had been before, to wit, in the year 1679, patented to one James Thompson, and therefore not liable to be proclaimed, produced and read in evidence to the jury the certificate for the tract of land called Thompson's Choice, dated the 12th of March, 1679, which is for the same land mentioned by the name of Thompson's Choice, in the patent under which the plaintiff makes title, and the same land located upon the plots in this cause returned, by that name; and which said certificate is as follows, to wit:

"James Thompson's Cert. 1,000 acres, } March 12, 1679. By  
 Thompson's Choice. Rent 2*l.* sterl. } virtue of a warrant  
 granted unto James Thompson, of Calvert County, for 550 acres  
 of land, bearing date 14th of January last, and by virtue of a  
 warrant granted unto the said Thompson for 250 acres of land, bear-  
 ing date the 24th of January last. These are therefore, in humble  
 manner to certify, that I, George Holland, deputy surveyor under  
 Vincent Lowe, Esquire, surveyor-general, have laid out for the said



Thompson a parcel of land called Thompson's Choice, lying in Baltimore County, on the ridge of Gunpowder River, beginning at a bounded oak, being the westernmost bounds of a tract of land late laid out for Major Sewell, and running W. 500 perches, to a \* bounded oak standing by the great falls, and running N. 122 from the said oak 320 perches, then E. 500 perches, then with a straight line to the first bounded tree, containing and now laid out for 1,000 acres of land, more or less," &c. The defendant then produced and read in evidence to the jury, a deed from James Thompson aforesaid to Gabriel Parrott, dated the 4th of January, 1693, for "all that parcel or tract of land, being part of a tract of land called by the name of Thompson's Choice, lying and being upon the Great Falls of Gunpowder River, beginning," &c. containing 200 acres more or less; also a deed from Arthur Thompson to Joseph Wilson, dated the 25th of August, 1702, for "all that piece or parcel of land situate, lying and being in Baltimore County, on the ridge of Gunpowder River, called or known by the name of Thompson's Choice, beginning," &c. "and formerly laid out for 1,000 acres, be the same more or less, together with," &c. "all which said premises were heretofore the estate and inheritance of James Thompson, late of Calvert County, gentleman, deceased, brother of the said Arthur; and the reversion," &c. "except, and out of this present grant always saved and forever reserved unto Gabriel Parrott, of Anne Arundel County, merchant, 200 acres of land, part of the said 1,000 acres, heretofore sold him by the said James Thompson deceased, beginning," &c. The defendant also produced and read to the jury, an entry in the oldest proprietary rent rolls to be found in the land office, in the following words and figures, to wit: "1,000 acres, Thompson's Choice, surveyed 12th March, 1679, for James Thompson, on the ridge of Gunpowder River, at the western bounds of the land of Major Sewell.

"800 acres, part in possession of Arthur Thompson.

"200 acres, residue possessed p. George Parker, Calvert County."

The defendant also produced and read to the jury, a deed from Joseph Wilson to Benjamin Berry, dated the 18th of October, 1706, for the same land as conveyed to the said Wilson by Arthur Thompson; also a \* deed from Benjamin Berry to Richard Snowden, 123 dated the 7th of October, 1737, for the same land as conveyed by Wilson to the said Berry; also a deed from Richard Snowden to John Baldwin, dated the 20th of October, 1741, for 200 acres of the land conveyed by Berry to the said Snowden; also a deed from Richard Snowden to Thomas Gittings, dated the 16th of April, 1742, for 600 acres, being the remainder of the land conveyed by Berry to the said Snowden; also a deed from John Baldwin to Stephen Onion, dated the 11th of June, 1747, for 200 acres, being the land conveyed to the said Baldwin by the said Snowden; also a deed from Gabriel Parker to Edward Reynolds, dated the 17th of December, 1722, for the same land as described in the deed from James

Thompson to Gabriel Parrott; also a deed from Thomas Reynolds to Thomas Gittings, dated the 25th of December, 1749, for the last above mentioned land. The defendant also produced and read to the jury, an entry in the proprietary old rent rolls, in the words and figures following, to wit: "1,000 acres, Thompson's Choice, surv. 12 March, 1679, for James Thompson, on the ridge of Gunpowder River, at the western bounds of the lands of Major Sewell.

"800 acres, part in poss. of Arthur Thompson.

"200 acres, the residue, possessed p. George Parker, Cal. County."

[ALIENATIONS.]

"800 Benjamin Berry from Joseph Wilson, 18 October, 1706.

"200 Edward Reynolds from Gabriel Parker, 17 December, 1722.

"800 Richard Snowden from Benjamin Berry, 4 October, 1737.

"200 Thomas Gittings from Thomas Reynolds, 21 Decr. 1749."

Also an entry in the Proprietary late rent rolls, in the following words and figures, to wit: "1,000 acres Thompson's Choice, surveyed 12 March, 1679, for James Thompson on the ridge of Gunpowder River.

<b>124</b>	" Poss. 200 . 0 8 0 Stephen Onion.
"	" 800 . 1 12 0 Thomas Gittings.

[ALIENATIONS.]

"4. Thomas Lucas from Thomas Gittings 28 July, 1769."

The defendant also produced and read to the jury, the will of Stephen Onion, above named, dated the 24th of August, 1754, whereby he devised his real estate to his nephew Zacheus Barrett, in tail, upon his taking upon himself the name of Onion, which he did. (See Act of March, 1762, ch. 21, to change the name of Zacheus Barrett.) The defendant also produced and read to the jury, a deed from Stephen Onion, eldest son and heir in tail of the said Zacheus Onion, to Thomas Bond Onion, dated the 12th of January, 1790, for 200 acres, as described in the deed from Baldwin to Onion before mentioned; also a deed from Thomas Bond Onion to Harry Dorsey Gough, the defendant, dated the 24th of February, 1790, for the last above mentioned land; also the will of Thomas Gittings, dated the 3d of November, 1758, whereby he devised his part of the said tract of land called Thompson's Choice, to his son Thomas Gittings; also the will of Thomas Gittings, son of the above named testator, dated the 8th of July, 1783, whereby he devised that part of the land called Thompson's Choice, held and claimed by him, to his sons the present holders of the same. The defendant also offered evidence to the jury to prove, that the pieces or parcels of land mentioned in and devised by the will of the said Thomas Gittings the younger, to his sons, are within the lines of the land called Thompson's Choice aforesaid, as located by the defendant upon the plots in this cause returned. The defendant then offered in evidence to the

jury the testimony of five living witnesses, who deposed that they have known the land located on the plots by the defendant as Thompson's Choice for a period of forty-eight years and upwards next last passed; that during all that time it was generally deemed, reputed and considered, as Thompson's Choice; that during the whole of that time, the whole of the said land was generally \* deemed, reputed and considered, as the property of the afore-  
said Thomas Gittings, the elder, and the aforesaid Stephen 125  
Onion, the elder, and those respectively claiming under them; that during the whole of the period aforesaid, the said Thomas Gittings, the elder, and those claiming under him, lived upon the said land, and cultivated a part thereof; and that as far back as they can remember, he Thomas Gittings, the elder, was so living upon and cultivating the same; and that from the first of their recollection, his said dwelling and cultivation had the appearance of having been many years settled; and that during the whole of the time aforesaid the said Stephen Onion, the elder, and those claiming under him, also held and cultivated a part of the said land. The defendant also swore two other witnesses, who deposed that they had known the said Thomas Gittings to reside on and cultivate lands on the said Thompson's Choice upwards of fifty years ago; and that at that time the place on which he lived appeared to have been some years settled; that the said Thomas Gittings, the elder, and those claiming under him, have held and occupied the same ever since, and still do hold and occupy the same; that they have known settlements and occupations upon that part of the land called Thompson's Choice, formerly held by Stephen Onion, the elder, for the same length of time; and that the same have ever since been held by the said Stephen Onion, and those claiming under him, and still are so held. The defendant then produced and read in evidence to the jury, the debt books of the Lord Proprietor of the Province of Maryland, wherein are charged against the holders of land, in the then Province of Maryland, the rents due to the said Proprietor for the lands by them respectively held, (the oldest of which rent books now to be found goes no further back than the year 1754,) and by the said rent books shewed to the jury, that Thomas Gittings, the elder, in the year 1754, stood charged to the Lord Proprietor for the rent of 300 acres of land, part of Thompson's Choice; and that he the said Thomas Gittings, the elder, and his son Thomas Gittings, \* the  
younger, continued to stand so charged until the Revolution; 126  
and that the said Stephen Onion, the elder, in the year 1754, stood charged in like manner with the rent of 200 acres, part of Thompson's Choice; and that he the said Stephen Onion, and those claiming under him, continued to stand so charged until the Revolution. The defendant then produced John Callahan, Esquire, the register of the land office, who being duly sworn deposed, that the certificate for Thompson's Choice is recorded among the land records in his office,

but that he has never seen, or been able to find the original certificate; that previous to the year 1700, the register of the land office did not record (as it appears by the old record books in his office,) the payment made by the party of the composition money for lands surveyed for such party, or make any marginal note in the record of the certificate of such payment, whether the said certificate was made upon a warrant of resurvey, or whether the said certificate, when returned, included more land than was expressed upon the warrant or warrants upon which the same was made. That in the year 1679, and before and after as far down as the year 1700, there are many certificates for lands surveyed for different persons, recorded in the land office, upon which it cannot be found that there is or are any patent or patents recorded in the said office; that this certificate for the said land called Thompson's Choice is in that situation. That it is, and always has been customary, to recite in the patent or grant, when issued, the consideration upon which the same issued, and the manner in which the composition money for the land mentioned in such grant was paid. That since the Revolution, several old patents, granted between the years 1678 and 1700, and one as far back as the year 1682, which were in the hands of those holding under the patentees therein named, and which had never before been recorded in the land office, have been produced to him to be recorded, and have been recorded. That it has sometimes happened to himself, since he

**127** has been in office, that the person \* for whom a patent was made out, took it to the Governor to procure his signature, and having obtained it, never returned the patent to him to be recorded, whereby it happened that a patent in such case did regularly issue, and yet there was and is no record of it in his office. That for near thirty years last passed, he has from time to time frequently heard a report, that one of the old record books in the Proprietary Land Office, containing the record of patents, has been lost. That the record books in the land office refer from one to the other, and that he never found a reference to any record book, which is not to be found in the office; and that he, Mr. Callahan, from thence is of opinion, no record book has been lost out of the said office, burnt or destroyed.

The defendant then prayed the opinion of the Court, and their direction to the jury, that from the evidence produced in this cause, if they believe it, they may and ought to presume, that a patent regularly issued from the Lord Proprietor of Maryland to the above named James Thompson, for the said land called Thompson's Choice.

DUVALL, J. [DONE, J. concurring. CHASE, Ch. J. owing to indisposition did not attend.] The Court are of opinion, and so direct the jury, that under all the circumstances of this case, if they find the facts above stated to be true, they may and ought to presume that a

patent regularly issued to James Thompson for the tract of land called Thompson's Choice. The plaintiff excepted.

*Harper and Johnson*, for the plaintiff.

*Martin*, (Attorney-General,) *Mason and Scott*, for the defendant.

Verdict and judgment for the defendant. The plaintiff appealed to the Court of Appeals, where the judgment of the General Court was affirmed, at November Term, 1803, the opinions expressed in both of the bills of exceptions having been concurred in.

\* GENERAL COURT, MAY TERM, 1801. 128

RIDGELY *et ux.* Lessee vs. NORWOOD.

Where a record was removed from a County Court to the General Court, by the defendant on a writ of *certiorari*, it was held that the defendant could not object to the reading in evidence of the record by the plaintiff, on the ground that the seal of the County Court had not been affixed to the same.

It is for the jury to determine whether the descriptive expressions in a grant of land are binding or not. (a)

THIS was an action of ejectment, brought in Baltimore County Court, and removed by the defendant to this Court by a writ of *certiorari*, for four tracts or parcels of land, viz: United Friendship, otherwise called The United Friendship, Ludloe's Lott, Larkin's Addition and Lloyd and Ludloe's Lott, all lying in Baltimore County. Plots returned. The defendant took defence for all the land included in Larkin's Addition, and the United Friendship.

1. The plaintiff at the trial, offered to read to the jury the record of proceedings in this cause transmitted by the clerk of Baltimore County Court, in pursuance of the writ of *certiorari* to the said County Court, and to which said record the clerk omitted to affix the seal of the said Court. To which the defendant's counsel objected, because it was not under the seal of Baltimore County Court.

The Court, [DUVALL and DONE, J. (b)], overruled the objection, and permitted said record to be read to the jury. The defendant excepted.

2. The defendant produced and read to the Court, a grant for the land called Yates his Forbearance granted to "George Yate of Anne Arundel County," on the 20th of July, 1684, and described to be "lying in Baltimore County, on the N. side of Patapsco River, in the woods, (1) beginning at a bounded oak at the end of the N. line of

(a) This decision is inconsistent with that rendered in *Carroll vs. Norwood*, 5 H. & J. 155. And see *Pennington vs. Bordley*, 4 H. & J. 465, where the case in the text is considered.

(b) CHASE, C. J. owing to indisposition did not attend.

the land of Thomas Roper, and running from the said oak W. 210 perches, (2) then running N. 140 perches, (3) then W. 100 perches, (4) then S. 100 perches, (5) then W. 100 perches, (6) then N. 160 perches, (7) then W. S. W. 200 perches, (8) then N. 160 perches, (9) then E. 588 perches, (10) then with a straight line drawn S. to the first bounded tree, containing and now laid out for 770 acres, more or less," &c. He also produced and read to the Court, a grant to John Larkin

**129** for the land called The United Friendship, \* dated the 1st of September, 1687, (1) "beginning at a red oak standing on a high point by a small gut on the N. side of Patapsco River, in Baltimore County, about a mile below the falls, and running thence down the river E. 160 perches, to another bounded oak, (2) then running N. into the woods 200 perches, (3) then running W. 100 perches, (4) then running N. 160 perches, (5) then running W. 60 perches, with a tract of land lately taken up for George Yates, of Anne Arundel County, gentleman, (6) then running W. S. W. 200 perches, with the said land, (7) then running S. 230 perches, bounding on the said Yates' land, (8) then running S. W. 44 perches, to the aforesaid river, (9) then running down the river S. and by W. 28 perches, (10) S. 38 perches, (11) then running S. S. E. 30 perches, (12) then running E. S. E. 20 perches, (13) lastly running E. N. E. 200 perches, to the first bound tree, containing in all 700 acres, more or less," &c. Both of which said tracts of land are located upon the plots.

The defendant then prayed the opinion of the Court, and their direction to the jury, that if the jury are of opinion that the tract of land called Yates his Forbearance, as located upon the plots, is the same land meant and referred to in the grant for the land called The United Friendship, by the name and description of "a tract of land lately taken up for George Yates, of Anne Arundel County, gentleman," that then the location of the said land called The United Friendship, must be laid down so as to make the fifth line thereof run with and bind on the fifth line of the land called Yates his Forbearance, from the place where the said last mentioned line of The United Friendship reaches and strikes by the true location thereof the said last mentioned line of Yates his Forbearance.

The Court, [DUVALL and DONE, J.] refused to give such opinion or direction to the jury. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to the

**130** Court of \* Appeals. The case was argued in that Court at November Term, 1803, by *Ridgely* and *Mason*, for the appellant, and *Martin*, (Attorney-General,) for the appellee.

It was argued by *Martin*, (Attorney-General,) on the first bill of exceptions, that as the defendant had taken defence in the General Court on warrant, and pleaded to the declaration, and had put the plaintiff to the expense of surveys, preparations for trial, expense of

witnesses, and had actually entered on the trial, all under a removal of his own, it was now too late for him to make the objection stated in this bill of exceptions; that if the plaintiff did not object to the mode of removal, the defendant had no right to do so, it being his own act; and that an appearance to a suit cured all errors in the proceedings before appearance—therefore, that as the parties did appear and act on the record removed, no inquiry could now be made into any defect in that removal, especially on the part of the defendant, who by the removal stopped the plaintiff from proceeding in the Court below. *Skinner*, 554; 2 *Freeman*, 468; 1 *Ventris*, 220.

\*The Court of Appeals affirmed the judgment of the General Court, concurring with that Court in the opinions expressed in **131** both of the bills of exceptions.

## GENERAL COURT, MAY TERM, 1801.

### HANNAN vs. LEE.

When there is a subsisting special agreement which has not been fully performed by the plaintiff, he cannot recover on an *indebitatus assumpsit*, for work and labor. (a)

But if the special agreement has been abandoned by the parties and a new contract made, which has been performed by the plaintiff, he may support an *indebitatus assumpsit*.

THIS was an action of *assumpsit* removed from Anne Arundel County Court, by a writ of *habeas corpus cum causa*. The declaration contained three counts, 1st, for sundry matters, &c. as per account filed, for work done on a house; 2d, for work, labor and services; and 3d, a *quantum meruit* for work and labor, &c. The defendant pleaded the general issue.

The plaintiff at the trial offered evidence to the jury to prove, that he had, at the instance and for the use of the defendant, and

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(a) When there is a special contract, the plaintiff cannot recover in an action of *indebitatus assumpsit* for work and labor, unless the work under the contract was fully performed and accepted by the defendant, or the contract was abandoned by mutual consent, or the fulfilment of it prevented by some act of the defendant. *Denmead vs. Coburn*, 15 Md. 29. Cf. *Speake vs. Sheppard*, 6 H. & J. 81; *Cushman vs. Sim*, 2 H. & J. 352; *Coates vs. Sangston*, 5 Md. 121; *Coursey vs. Covington*, 5 H. & J. 45. If the contract be rescinded by the parties, after its part performance by the plaintiff, he may recover for the part performance on a general count. *Watkins vs. Hodges*, 6 H. & J. 38. Where the special contract has been fully executed, and nothing remains to be done but the payment of the money, the amount due may be recovered in *indebitatus assumpsit*, and in such case it is not necessary to declare upon the special agreement. *Jenkins vs. Long*, 8 Md. 132. Cf. *Rodemer vs. Hazlehurst*, 9 G. 288.

at his request, done the work and labor mentioned in the account filed.

**132** \* The defendant then offered evidence to prove, that the articles mentioned in the said account, are part of a house which the plaintiff undertook to build for the defendant, on the following terms, to wit: That 300*l.* were to be paid by the defendant to the plaintiff for the building the said house, in the following manner: 200 dollars on the raising the house; 200 dollars on the covering in the house; and the remaining 400 dollars to be paid between the last mentioned work, and on the final completion of the work. That the plaintiff undertook to finish the said house by the 12th of November, 1798. That the defendant, in addition to the money aforesaid, agreed that the plaintiff should have a negro man named Simon, to assist during the building the said house. That some time about the 27th of November, 1798, the plaintiff told the defendant that he would not go on with the said work, and at that time the house was not covered in. The defendant then informed the plaintiff, that if he would go on and finish the covering in of the house, he would pay him the second payment; which the plaintiff refused.

The plaintiff then offered evidence to prove, by the defendant's witnesses, that he had employed two workmen under him to build the said house, and that the said workmen did, on account of the plaintiff, and under the contract made between the plaintiff and them, go on and cover in the said house; that during the time they were so employed, and after the said 27th of November, 1798, the defendant was frequently present with them while working on the house; that the said workmen, with the consent of the defendant, did charge the plaintiff with the work by them done until the house was covered in; that the said workmen did finish the house; and for the work by them done after the covering in as aforesaid, the defendant paid them; but for work done after the 27th of November, aforesaid, and before the covering in of the house, the defendant informed the said workmen the plaintiff was to pay them.

The defendant offered evidence to the jury to prove, that a special contract and agreement was made and \* entered into between **133** the plaintiff and himself, as to the building of the said house, and the work and labor thereon to be employed and expended; and that the said work and labor, for which the plaintiff claims compensation, was made and done in pursuance of the said special contract and agreement, which contract and agreement, was not complied with. And, on the prayer of the defendant by his counsel,

The Court [CHASE, Ch. J. DUVALL and DONE, J.] directed the jury, that if they were of opinion, from the whole of the evidence in this cause, that there was a special contract and agreement between the plaintiff and defendant to build a house for a certain sum, to be



paid at certain periods, that then the plaintiff cannot recover under the counts in his present declaration. The plaintiff excepted.

*Martin*, (Attorney-General,) and *Johnson* for the plaintiff.

*Key*, and *Shaff*, for the defendant.

Verdict and judgment for the defendant. The plaintiff appealed to the Court of Appeals, and at June Term, 1804, the appeal was argued in that Court by the same counsel.

For the appellant it was contended that a special agreement might be given in evidence on general counts; for which were cited, *Payne et al. vs. Bacomb*, *Doug.* 651; *Bull. N. P.* 139; *Fitz.* 302.

For the appellee it was contended, that if there be a special agreement, it must be declared on, and if declared on, must be proved; so that in no case could a recovery be had on the general counts; for which were cited, *Esp.* 138; *Bull. N. P.* 145; *Doug.* 23; 2 *East*, 145; 1 *T. R.* 133.

RUMSEY, Ch. J. (JONES, POTTS and DENNIS, J. concurring. MACKALL, J. absent.) In this cause the Court of Appeals concur with the General Court, and therefore affirm their judgment.

As a general proposition, we think the law declared in their direction correct; but we are of opinion, that the general rule 134 admits of exceptions, and that if the evidence offered on the part of the plaintiff was credited by the jury, that it brought the plaintiff's case within one of those exceptions to the general rule.

In the case of a continuing contract as the original contract proved between the parties, if that contract had not been waived, and a new one proposed and acceded to, the plaintiff could not support a general *indebitatus assumpsit*; but if the waiver of the original contract had appeared to the jury, and the second contract set up had been proved to their satisfaction, to wit, the covering in of the house, we should have been of opinion, that after the completion of such second contract by the plaintiff, if that was the case, that the plaintiff might well have supported his general *indebitatus assumpsit*.

#### GENERAL COURT, MAY TERM, 1801.

##### THE STATE vs. BOONE'S Executors.

A plea of *plene administravit* cannot be withdrawn at the trial Court, for the purpose of pleading *ne unques executor*.

ACTION of debt. Defendants pleaded payment and *plene administravit*. Plaintiff replied the general replications, and issues were joined, and the cause standing for trial at the present term,

*Gantt*, for the defendants, moved the Court to permit him to withdraw the plea of *plene administravit*, for the purpose of pleading, a plea of *ne unques executors*.

But the Court refused to give the leave, or permit the plea to be filed.

*Martin*, (Attorney-General,) for the State.

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\* GENERAL COURT, MAY TERM, 1801.

BEAN'S EX'R *vs.* JENKINS' Adm'r.

A surety in a testamentary bond is not a competent witness in behalf of the executor in a suit by the executor.

APPEAL from Frederick County Court in an action of *assumpsit*. The plaintiff in the Court below, (the present appellant,) at the trial offered as a witness one Samuel S. Thomas, to whom the defendant objected, as interested in the matter in dispute; and to prove this, offered witnesses, who proved that the plaintiff had declared that he had farmed the books of accounts of his testator to the said Thomas for a certain sum of money, and that the said Thomas was to have all the profits arising from the books, and was authorized to settle the accounts there standing. He also proved, that the said Thomas was one of the plaintiff's securities in the testamentary bond, and that Thomas had said he had in his possession the said books of accounts, and had had great trouble in collecting the debts, and expected to have a great deal more; that being a justice of the peace, where the claims were within a magistrate's jurisdiction, he issued the warrants, tried them himself, and gave judgments, and received the money; that he was judge, clerk and receiver; that he had taken the goods of the testator at the appraisement, and had sold a part, and contracted to sell the residue; that he had made himself answerable for about £1,700 of the testator's debts; but that the goods and debts belonging to the estate, would more than pay that sum, and enable him to make something clever.

The plaintiff then offered in evidence a release, dated the 24th of November, 1798, signed and sealed by the said Thomas, releasing to the plaintiff all claims, interest and demand, which he had or might have for any commission, compensation, or reward for his services, in the settlement of the estate of the said Bean. He also offered another release, dated the 22d of March, 1800, (the time of the trial,) signed and sealed by the said Thomas, releasing to the plaintiff all interest, claim or demand, which he had or might have had for every matter or \* thing touching the administration of the estate of

**136** the said Bean, and from all contracts or engagements entered into between the plaintiff and the said Thomas, touching the debts due the said estate, and from all interest, claim and demand, which he had on or in the debts due the said estate, or any of them. Which said two papers were proved to have been duly executed and

delivered by the said Thomas to the plaintiff. The plaintiff, before the offering the said two papers, objected to the Court's receiving any evidence of the declarations of the said Thomas, to disqualify him from being sworn in this cause as a witness; but the County Court (PORTS, Ch. J.) overruled the plaintiff's objection, and on all the evidence determined the said Thomas to be an interested witness, and refused to suffer him to be sworn to the jury. The plaintiff excepted; and the verdict and judgment being for the defendant, this appeal was prosecuted.

The General Court affirmed the judgment of the County Court. The appellant appealed to the Court of Appeals, and the judgment of affirmance was affirmed in that Court at November Term, 1803.

*Shaaff*, for appellant. *Mason*, for appellee.

### GENERAL COURT, MAY TERM, 1801.

#### SMOOT'S Adm'r vs. BUNBURY'S Ex'r.

A probate of an account under the Act of 1729, ch. 20, omitting to state that the creditor had not received "any security" for his debt, is not evidence under that Act. (a)

APPEAL from Charles County Court from a judgment in favor of the defendant, the present appellee. It was an action of *assumpsit* for sundry articles properly chargeable in account. The account exhibited commenced the 15th of February, 1785, and ended the 25th of April, 1786. General issue pleaded.

The plaintiff, to prove the issue on his part, offered in evidence to the jury, the book of accounts of his intestate, containing an account against the defendant's testator, stated in page 31, and which said \* book of accounts, in page 55, contained the following probate, made by and in the hand-writing of the plaintiff's in- **137** testate, except the signature of the justice, viz: "Charles County, ss. August 27, 1785. Then came Edward Smoot before me, one of the justices of the peace for the said county, and made oath on the Holy Evangely of Almighty God, that all the accounts contained in this book, from page one to page fifty-five, are just and true, as they are and stand stated, and that he hath not directly or indirectly, to the best of his knowledge, received any part, parcel, or satisfaction for the same, more than the several credits therein given.

"B. FENDALL."

To which book of accounts and probate the defendant objected as not being competent evidence to the jury; and the County Court (STONE, Ch. J.) sustained the objection. The plaintiff excepted, and

(a) See *Evans vs. Bonner*, 2 H. & McH. 377, note.

the verdict and judgment being for the defendant, this appeal was prosecuted.

*T. Buchanan*, for the appellant.

*J. Campbell* and *W. Dorsey*, for the appellee.

The General Court affirmed the judgment of the County Court.

### GENERAL COURT, MAY TERM, 1801.

#### DARNALL *vs.* HARRISON.

If a cause be under notice of trial, and the defendant under a rule to employ new counsel, and a copy of such rule be served on him, the Court will enter judgment against him, if he does not appear in person, or by attorney, though the rule be laid at the same term. (a)

THIS cause was standing under notice of trial, issue being joined, and a rule laid, at the present term, on the defendant to employ new counsel, his \* former counsel having declined the practice of  
**138** the law, &c. An affidavit of the service of a copy of the rule on the defendant was filed.

*Cooke*, for the plaintiff, moved the Court for trial or judgment at the present term, the defendant not appearing in person, or by attorney.

Ruled accordingly.

*Johnson*, afterwards appeared for the defendant, and confessed judgment.

### GENERAL COURT, MAY TERM, 1801.

#### WILSON'S EX'X *vs.* RINE.

Whether notes, placed by a testator for collection in the hands of the husband of his daughter, were intended to be bequeathed to her under the following clause, viz. "I give and bequeath unto my daughter, all the property she has in her possession, belonging to me, of every description, at the time of my decease forever." *Held*, that it was the province of the jury to determine whether by the will and evidence in the cause, the notes were intended by the testator as the property bequeathed to his daughter.

(a) This case is examined in *R. R. Co. vs. Ritchie*, 31 Md. 196, where it was ruled that when a defendant has appeared to an action by counsel, and filed pleas, the only power the Court can exercise, upon his failure to comply with a rule to employ new counsel, is to authorize the plaintiff to proceed *ex parte*.

A general legacy does not vest the property bequeathed in the legatee, without the assent of the executor, and the executor may maintain trover for such property against the legatee.

Whether or not a bequest to the daughter is good evidence to the jury in mitigation of damages in an action of trover by the executrix against the husband of the daughter, for the property bequeathed, if there is no proof of an assent by the executrix to such legacy.

**APPEAL** from Frederick County Court. It was an action of trover for notes or single bills. The general issue pleaded.

1. The plaintiff, (now appellant,) at the trial, proved that the notes mentioned in the declaration were put into the hands of the defendant, (now appellee,) by Jacob Wilson, the plaintiff's testator, to be collected for and paid over to him the testator. That the plaintiff, after the death of the testator and after letters testamentary were granted to her, and before this suit was brought, demanded the said notes from the defendant, who admitted them to be in his possession, but refused to deliver them up, claiming them as his own property, bequeathed to his wife Priscilla, by the will of the said testator. The defendant proved, that on the 16th of September, 1797, the testator declared to a witness, that as Priscilla, the wife of Rine, (the defendant,) was his only daughter, he meant to do for her all he could, or words to that effect; that he had the day before put some writings into the hands of the said Rine; that all they had in their hands was their right and title; that he meant to give it to them, as the witness should see, but that he had not so told his son-in-law and daughter; that it was his intention they should have absolutely all they had in their hands; that he expected to set out for Baltimore, where he \* lived, the next day, and that he did not know **139** that he should live to come back; if he did not, he intended to give them all they then had in their hands; and if he did come back, he would do more for them. That he accordingly, on the next day, or two days after, did go from Frederick County, where this conversation happened, to Baltimore, and there died in the month of October, 1797. The defendant then offered to read to the jury the will of the said Jacob Wilson, the testator, which was duly executed in the presence of two witnesses, and proved according to law, to which the plaintiff objected. But the County Court, (POTTS, Ch. J.) overruled the objection.

2. The defendant then read in evidence to the jury, the will of the said Wilson, dated the 6th of October, 1797, in which is the following bequests, viz. "I give and bequeath unto my daughter Priscilla, all the property she has in her possession belonging to me, of every description, at the time of my decease, for ever." The plaintiff then prayed the opinion of the Court, and their direction to the jury, that by the said will the notes in the declaration mentioned were not bequeathed to the defendant's wife. The County Court, (POTTS, Ch. J.) refused to give such opinion and direction, but directed the

jury, that it was their province to determine, whether by the will aforesaid, and evidence in the cause, the notes in the declaration mentioned, were intended by the testator as the property bequeathed to the wife of the defendant in his will.

3. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that unless the defendant could prove an assent on the part of the executrix to the legacy bequeathed to the said defendant's wife, that in that case, even if the notes, mentioned in the declaration, were bequeathed to the defendant's wife, the said notes belonged to the plaintiff; and that the said bequest to the defendant's wife could not be offered in evidence to the jury in mitigation of damages. But the County Court, (POTTS, Ch. J.)

**140** was of \* opinion, and so directed the jury, that the said bequest to the defendant's wife was good evidence to the jury in mitigation of damages, even without an assent by the executrix aforesaid proved, unless the plaintiff could prove that there were debts or legacies due from the estate of said Jacob Wilson, deceased, for the payment and satisfaction of which there was not sufficient property of the deceased, independent of the debts due by the notes mentioned in the declaration. The Court further directed the jury, that upon the case stated, the plaintiff was entitled in their verdict, unless the defendant shewed a property in the notes in him derived otherwise than under the will aforesaid. But that the several pieces of evidence offered were proper to be considered by them in ascertaining the damages to be given by them for the plaintiff. The plaintiff excepted, and the whole of the preceding facts were included in one bill of exceptions. Verdict for the plaintiff, and damages assessed to 54*l.* 0*s.* 1*d.* current money. The principal sum claimed by the notes was 181*l.* 12*s.* 2*d.* current money, besides interest, the plaintiff therefore appealed from the judgment rendered in his favor upon the verdict, to this Court.

*Mason and Shaaff*, for the appellant.

*J. Dorsey*, for the appellee.

The General Court were of opinion, that the assent of the executrix was necessary to vest the legacy in the legatee, Priscilla, the wife of the appellee, and that proof of such assent ought to have been adduced to the jury; and that the Court below erred in not giving the direction thereupon prayed. The judgment of the County Court was therefore reversed, and the record ordered to be remitted with a writ of *procedendo*.

## \* GENERAL COURT, MAY TERM, 1801. 141

WILSON'S Ex'x, use RINE *vs.* HAMMITT *et al.*

The legal plaintiff has control over the suit, and may dismiss or prosecute it as he pleases, unless there be an assignment, &c. (a)

THIS was an action of debt in Frederick County Court, and the following statement appeared in the record on an appeal to this Court. The plaintiff, Mrs. Wilson, who is the mother of the defendant Hammitt, the principal in the bond on which the suit is brought, by J. T. Mason, claiming to be her attorney, came into the County Court, and denied the right of John Rine, the person for whose use the said suit is said to be brought, to the bond upon which it is brought and claimed the same as her property, and alleged that said bond had never been assigned to, or in any manner transferred to Rine; and Mrs. Wilson, by her said attorney, in open Court, ordered, and does hereby order the said suit to be dismissed. The County Court, (POTTS, Ch. J.) refused to permit the said J. T. Mason to enter his appearance to the said suit for the purpose expressed, because it appeared that a certain J. Dorsey, had instituted the said suit, and was the attorney of record for prosecuting the same, and still claims to be the attorney for John Rine, and for him prosecutes this suit in the name of Mrs. Wilson, without having any special authority from her; and because the said Mason was one of the attorneys of record for the defendants, for defending the said suit, from November Term, 1791, at which term the defendants appeared and gave bail, and continued as one of their attorneys of record for the purpose aforesaid, until the moment that a jury was directed to be empannelled for the purpose of trying the issue in the said cause, (March, 1800,) when the said Mason ordered the clerk to strike out his appearance for the defendants, and to enter it for the plaintiff, Mrs. Wilson, and to strike off the action, or to enter his order for discontinuing the same of record in the cause. Verdict and judgment for the plaintiff, from which Mrs. Wilson appealed to this Court.

\* *Mason*, for appellant, produced to the General Court a power from Mrs. Wilson, authorizing him to appear for her, &c. and the Court admitted the said Mason to appear for her. 142

The General Court reversed the judgment of the County Court.

*Mason*, for the appellant, issued an attachment against John Rine for the costs adjudged on the reversal of the judgment.

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(a) See *Green vs. Johnson*, 8 G. & J. 390; *Alex. Br. Stat.* 292.

## GENERAL COURT, MAY TERM, 1801.

GRAY *et al.* *vs.* SWAN *et al.*

The shipper, when he effects insurance, and holds the policy, in case of loss must first have recourse to the underwriters before he can claim from the owner.

The sentence of an Admiralty Court is conclusive on the question of neutrality, if it plainly appear, or can be inferred from the sentence that such question was decided, but if it does not so appear it is not conclusive.

ASSUMPSIT for goods sold and delivered. The facts were these: The defendants, who were wholesale merchants residing in the City of Baltimore, some time in the spring of the year 1794, by their agent Mr. Carruthers, of London, delivered to the plaintiffs, who were merchants residing in London in Great Britain, the following orders, viz. "Schedule of linens, &c. to be shipped by Messrs. Gray & Freeman, of London, on account and risk of John and Joseph Swan, of Baltimore, and fully insured and marked HS. No. 50," &c. [Here follows the specification of the quantity and quality of the goods.] "The above to be shipped in the brig Two Brothers, or first American vessel for Baltimore." In compliance with these orders the plaintiffs on or about the 3d of June, 1794, shipped the goods mentioned in the above schedule, on board the brig The Brothers, to the address and for account and risk of the defendants; and in a few days thereafter effected a policy of insurance on the said goods to their full value, and in the policy warranted the brig to be American property. The brig was afterwards, in the due prosecution of her voyage from London to Baltimore, captured by a French privateer, called Le Ca Ira, and carried into Saint Bartholomew's, where she and her cargo were libelled by \* the

**143** captors in the Court appointed by the French Republic, for the trial of prizes, and by that Court adjudged a good prize, and directed to be sold for the benefit of the captors, which said adjudication is as follows; to wit: "Extracts from the minutes of the register's office, of the commission appointed for the trial of the prizes made by the privateer Le Ca Ira: In the name of the French people, to all those who these presents may see, greeting. Examined by us Pierre Bourdichon, Claude Reymond Penicaud, Jean H. Gassies, and Bernard Golh, judges appointed by the citizen Hugues, commissary, delegated by the national convention for the windward Islands, to judge definitively the prizes made by the privateer Le Ca Ira, Captain Paris, and particularly the brigantine "The Brothers," prizes to the said privateer. The papers found on board the said vessel, The Brothers, translated, &c. are as follows:

1st. A passport for the said vessel, dated at George-town, Maryland, the 6th October, 1789. A recommendation given Captain



John B. Smith by the plenipotentiary of the United States of America at the Court of Great Britain, in order that he be not molested, and that all assistance and protection be granted him—the said recommendation dated at London the 2d of June, 1794, and to be in force for the time of six months.

Signed. THOMAS PINCKNEY.

2d. A passport granted the said vessel *The Brothers* by Thomas Pinckney, minister plenipotentiary, and Joshua Johnson, consul of the United States of America, dated the 16th April, 1793, for her voyage from Amsterdam to St. Eustatia.

3d. An invoice dated 24th May, 1794, beginning by these words—"Account of merchandises received on board *The Brothers*, Capt. John B. Smith, (B.) from Baltimore"—without signature.

4th. Another invoice of the merchandises, that the said Capt. says belongs to him, beginning as follows—"London, 17 June, 1794. Captain J. B. Smith bought of Sterling, Hunters & Co." &c. &c.

\* 5th. A certificate of the customs of London, by which Cap. John B. Smith, and Christopher Whipple, his mate, **144** bind themselves not to land any of the merchandises in any of the ports of England—dated 20th June, 1794.

6th. Ten bills of lading, by which it appears that merchandises were shipped at London for America.

7th. A bill of exchange drawn from Maryland on the 28th August, 1793, on London, in favor of Jno. B. Smith, (Captain,) and protested at London 13th October, 1793.

8th. A letter conceived in these words: Sir, you will be pleased to be with us to-morrow at 10 o'clock, in order to have *The Brothers* dispatched. We could have wished to have seen you to-day, as we have positive orders from the person who has purchased the brigantine. We are somewhat surprised at your having employed other brokers.

(Signed,)

January 22d, 1794.

CALDCLEUGH & BOYD.

9th. A muster-roll of the said vessel, without date or signature, by which it appears that the said vessel sailed from London for Baltimore, and from thence to go to any part of America, to take her cargo for Europe. The interrogation of John Harman, sailor, on board the vessel taken this day, all the other documents produced, having heard the report of citizen Bourdichon one of the judges. The conclusions of the national commissary in this party and all considered. We say, that according to the laws of the State, and especially the Ordinance 1681, for the navy, Article 3, concerning prizes, it is evident, that all ships, wherein the enemies of the State are concerned, are lawful prizes, since that, according to the said Article, it would authorize the capture of any ship whatever, when she was loaded with effects belonging to the enemy; the capture is then more valid when the subject of a State at war is co-proprietor of the vessel captured, which is proved to be the case in the prize,

The Brothers; the papers produced proving that she has a co-proprietor in London, which leaves no doubt of the validity of the \* prize. Considering moreover, that the captain's papers are **145** not in order, the muster-roll he has produced being without date or signature, (which is a manifest trespass of the law,) every thing concurs to declare lawful the aforesaid prize in behalf of the concerned in the privateer *Le Ca Ira*, who is the captor thereof. Therefore we declare the aforesaid brigantine *The Brothers*, together with her cargo and appurtenances, to be the right and lawful prize of the aforesaid privateer *Le Ca Ira*, who is the captor thereof. We order that the whole be sold," &c. &c. "Done at Port Liberty, in the Hall of the Palace of Justice, by us the aforesaid judges, the 23d vendemaire, in the afternoon, third year of the French Republic, one and indivisible. Signed," &c. &c.

As soon as the plaintiffs were informed of the capture and condemnation of the vessel and cargo, they, on behalf of the defendants, made a demand on the underwriters for payment for the loss. The underwriters refused to pay; and the plaintiffs having waited till the expiration of the time limited for the payment of the goods, demanded payment from the defendants, who also refused; and this suit was brought to recover the amount as charged in the invoice, to wit, 1,393*l.* 2*s.* 6*d.* sterling. The shipment of the goods and effecting full insurance, agreeably to orders, were admitted by the defendants.

*Martin*, (Attorney-General,) and *Harper*, for the defendants, contended, and it was so proved by several respectable merchants examined on the occasion, that by the usage of trade the shipper, when he effects insurance and holds the policy, is bound, in case of loss, in the first instance to have recourse to the underwriters, and cannot claim from the merchant here till he has taken all legal measures to recover from the underwriters, and has failed; that in this case the plaintiffs were the holders of the policy, and it does not appear from any thing before the Court, that they have taken any legal measures to enforce the payment of the policy, and therefore could not at this time maintain their action for the value of the goods against the defendants.

*Key* and *Brice*, for the plaintiffs.

*Martin*, (Attorney-General,) and *Harper*, in reply, admitted that a condemnation by an Admiralty Court, that the vessel captured "was enemy's property," however false in fact, was nevertheless **147** conclusive \* evidence against all the world of that fact. But that in this case the decree did not state, as the ground of decision, that the vessel was enemy's property, nor was it necessarily to be inferred from any thing in the decree that such was the ground of the condemnation. The Court only stated the evidence produced, but drew no conclusion from it. That the evidence was

not such as to authorize this Court to determine on what grounds the Admiralty Court adjudged the vessel a good prize.

THE COURT adopted the arguments of the counsel of the defendants, and thought the sentence of the Admiralty Court read in this cause, was too ambiguous and obscure to enable them to ascertain, with sufficient precision, on what ground the decree was founded; enough did not appear, to satisfy them that the sentence proceeded on the ground of the brig's being enemy's property, of course there was no breach of warranty; and the Court were of opinion, from what appeared in the trial, that the underwriters were answerable, and that the plaintiffs, as holders of the policy, by the usage of trade, must have recourse to them in the first instance.

After this opinion was given, the plaintiff's counsel thought it best to suffer a non-suit.

Cases cited in the argument. *Park on Insur.* 358, 360, and the cases there cited; *Calvert and Bovill*, 7 T. R. 523; *Geyer vs. Aguilar*, 7 T. R. 681.

## GENERAL COURT, MAY TERM, 1801.

### SMITH vs. WILLIAMSON.

Right of possession only, is necessary to support an action of replevin. (a)

A father is the natural guardian of his children, and where they have no other guardian, may maintain replevin for their personal property. (b)

This he may do, though the children be females, and upwards of sixteen and under twenty-one years of age, at the time the property is taken from them, or at the institution of the suit.

Limitations in replevin cannot be taken advantage of unless pleaded.

APPEAL from a judgment in an action of *replevin* for slaves, rendered in Calvert County Court, for the plaintiff below. The replevin was issued on the 17th \* of October, 1799, and the defendant pleaded the general issue pleas. **148**

1. The plaintiff below, (the present appellee,) at the trial, proved that William Lyles was in 1779, the owner of the slaves mentioned in the declaration. That his daughter Elizabeth intermarried with the plaintiff in that year, and that Lyles gave said slaves to his daughter, upon her marriage. That about the year 1782, the plaintiff reconveyed the slaves to Lyles. That in the month of May, 1783, Lyles gave the slaves to the children of the plaintiff by said Elizabeth his daughter, to wit: Elisha, Martha and Eleanor; that

(a) See *Cullum vs. Bevans*, 6 H. & J. 469; *Lamotte vs. Wiener*, 51 Md. 548; *Iron Co. vs. Tüghman*, 18 Md. 74.

(b) See Alex. Br. Stat. 469-474.

thereupon the said slaves, were for five years in the possession of the plaintiff, as the father and natural guardian of his said children; and that after the death of Elizabeth, the plaintiff's wife, which happened in 1788, Lyles took the negroes again into his possession, and retained them until the time of his death in 1790; that during this last period, Lyles, from his own confession, was to pay the sum of 3*l.* a year to the plaintiff for the use of his said children, as a hire for the negroes, and had admitted that they were the property of the said children. The plaintiff also proved, that in 1790 he claimed the said negroes of the executrix of Lyles, and that the executrix and the plaintiff agreed to refer the dispute or claim to the negroes to arbitrators; that accordingly an agreement to that effect was drawn, but not executed, and nothing farther was done between them. That said executrix, and those claiming under her, retained possession of the negroes from the death of Lyles until the institution of the present action. Whereupon the defendant prayed the opinion of the Court, and their instruction to the jury, that if they should be of opinion, from the evidence offered, that the negroes mentioned in the declaration were the slaves and property of the children of the plaintiff at the time this action was instituted, that then the plaintiff was not entitled to recover; and that their verdict should be for the defendant. But the County Court, (STONE, Ch. J.) refused to give that opinion and instruction. But directed the jury, **149** \* that if they found that the plaintiff had, at the time of bringing this action, and hath the right to the possession of the negroes mentioned in the declaration, that he can recover in this action; and if the jury find that the said negroes were and are the property of the infant children of the plaintiff as aforesaid, and that no other person was or is guardian, or had the care and custody of the said children, and their property, that then the plaintiff, being the natural guardian of the said children, may maintain this action. The defendant excepted.

2. The defendant then offered evidence to prove, that the said Martha, one of the said children of the plaintiff, was dead, and that she died in 1791; and that the said Eleanor, another of the said children, was born about the year 1780, and that the said Elisha, the other of the said children, was born about the year 1788. Whereupon the defendant prayed the opinion of the Court and their instruction to the jury, that if they were of opinion, from the evidence offered, that the said Eleanor was upwards of sixteen years of age at the time this action was brought, that in such case the plaintiff was not entitled to recover in this cause. But the County Court, (STONE, Ch. J.) refused to give the opinion as prayed; but was of opinion, and so directed the jury, that if they found that the said Martha was dead, and that she died in the year 1791, and that the said Eleanor was not sixteen years of age when the taking of the negroes aforesaid happened, nor twenty-one years of age when this

action was brought, and that the said Elisha was not sixteen years of age when this action was brought, that the plaintiff may well maintain his action. The defendant excepted.

3. The defendant gave in evidence to the jury, that in 1793, Mary Lyles, the executrix of William Lyles, was in the actual possession of the negroes mentioned in the declaration; that in that year she sold the said negroes to the defendant for the sum of £50; that the purchase money was paid for the said negroes by the \* defendant; that from the year 1793 to the issuing of the writ in **150** this cause, the defendant was in the actual adversary possession of the said negroes, claiming them and using them as his own; and that during all that time the plaintiff in this action was not under any of the savings mentioned in the third section of the Act of Assembly, entitled, "An Act for limitation of certain actions, for avoiding suits at law," passed in the year 1715, ch. 23. Whereupon the defendant prayed the opinion of the Court, and their instructions to the jury, that if they should be of opinion, from the evidence offered, that the defendant had been in the actual adversary possession of the said negroes by the purchase aforesaid, from the year 1793 to the issuing of the original writ in this cause, that during all that time the defendant resided in Calvert County in this State, and that during the time aforesaid, the plaintiff was resident in this State, and was not under any of the disabilities, and did not prove himself under any of the savings mentioned in the Act of Assembly aforesaid, that then the plaintiff was not entitled to recover in this action. But the County Court, (STONE, Ch. J.) refused to give the opinion and direction as prayed; but was of opinion, and so directed the jury, that inasmuch as the Act of Limitations is not pleaded in this cause, that the adversary possession aforesaid of the defendant is no bar to the plaintiff in this action. The defendant excepted. Verdicts and judgment being for the plaintiff, the defendant appealed to this Court.

*Gantt*, for appellant.

*Kilty* and *Johnson*, for the appellee.

The General Court affirmed the judgment of the County Court, concurring with that Court in the opinions expressed in all the bills of exceptions.

\* COURT OF CHANCERY, JUNE TERM, 1801. **151**

CONWAY *et al* vs. GREEN'S Adm'r.

One of the representatives of a deceased person may support a bill in equity against the administrator for his share of the intestate's estate. (a)

(a) See *Hammond vs. Hammond*, 2 Bl. 316.

An administrator or executor cannot purchase at his own sale.

The Orphans' Court having ratified such sale, does not preclude the Court of Chancery from setting it aside. (b)

Could the Orphans' Court, before the Act of 1798, ch. 101, set aside a sale where the executor or administrator acted fraudulently, &c.?

BILL filed for an account of an intestate's personal estate, to be distributed among his legal representatives.

The questions in this case were two. 1st. Whether one of the representatives of a person deceased could support a bill in equity against the administrator for his share of the intestate's estate? And 2nd. Whether a purchase made by the administrator at his own sale, under an order of the Orphans' Court was not void?

1. For the defendant it was contended, on the first question, that an administrator stands in the same relative situation to the representatives of his intestate, that all trustees do to those interested in the trust; and that in the last case it was settled that all must join in a suit against the trustee. For which were cited, 1 *P. Wms.* 428, 429; 1 *Vern.* 110; 1 *Eq. Ca. Ab.* 72; *Nelson's Cha. Rep.* 243.

2. On the second question, that the rule of equity, prohibiting trustees to purchase at their own sale, was confined to sales voluntarily made by them. But that whatever that rule might be, it could not apply to this case, since this purchase had been confirmed by the Orphans' Court in the settlement made there by the defendant—That Court having competent jurisdiction for that purpose.

HANSON, C. The first question is, Whether or not there are sufficient parties?

The Chancellor conceives that there are. Margaret Conway, and the other complainants, could not compel the rest of the representatives to join them as complainants. Why should they make defendants of them, when from them they are to seek no relief? In fact, the Chancellor considers a representative, entitled to a distributive

**152** share, on a footing with a legatee. No \* reason appears to him wherefore a cause may not be decided between one such representative and the administrator, as well as between one legatee and an executor. Why shall this Court adopt rules which must inevitably bring on it the charge of oppression? Why make parties of persons who do not wish to complain, and who have nothing demanded from them?

There being competent parties, the next question is, whether the complainants have shewn themselves entitled to relief?

The Chancellor earnestly wishes it understood, that, in his opinions no rule of this Court, adopted for the prevention of fraud, ought to be relaxed; but that, on the contrary, rules against fraud ought to be

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(b) See *Williams vs. Marshall*, 4 G. & J. 376; *Eichelberger vs Hawthorne*, 33 Md. 588; Alex. Br. Stat. 590.

as strict as possible. He has known more than one instance where a trustee has openly purchased, and there was no reason to doubt the fairness of his conduct, and yet this Court would not ratify the sale. It would not establish a precedent, for this plain reason, that, if such sales were allowed, there would be practiced frauds impossible to be detected, as indeed are more than nine in ten of the frauds which are perpetrated. There is even a stronger reason for not permitting an executor or administrator to purchase, than for preventing a trustee appointed by this Court, or by the deed of an individual. An executor or administrator, under the laws existing at the time of the sale by the defendant, had everything in his own hands. It is by no means admitted, that the Orphans' Court could legally set aside a sale, although perhaps some Orphans' Courts exercised such a power. It seems to the Chancellor, that before the adoption of the new testamentary system, (1798, ch. 101,) the Orphans' Court on application, had only a power of directing a sale, and that if in making the sale, the executor or administrator acted fraudulently, or betrayed his sacred trust, the relief was to be sought only, as it is in the present case, in the Court of Chancery. He conceives then, that the settlement of the Orphans' Court ought not to preclude the complainants from the relief they pray for by their bill. And even if the Orphans' Court \* had the power of setting aside the sale, it does not follow that this Court lost its jurisdiction. There is no doubt **153** that the defendant at his own sale purchased to a large extent; and that the prices were far below the appraisement. The former circumstance was sufficient without the latter. But it is even proved that the property was not distributed into lots, so as to make it likely to sell advantageously. There are other circumstances which it is not necessary to mention.

Decreed, that the defendant account, &c. That he be charged for the personal estate according to the appraisement, &c.

*Ridgely*, for complainants. *Shaff*, for defendant.

#### GENERAL COURT, (E. S.) SEPT. TERM, 1801.

##### LOWES vs. HOLBROOK.

A conveyance for a moiety of the land for which an action of trespass *q. c.* *f.* is brought, permitted to be read in evidence, before it was proved that the grantor therein had a right to convey. The Court will direct the jury, in case it is not afterwards shewn that he had such right, that such conveyance is not evidence.

It must appear on the face of the return to a commission to mark and bound lands, that sufficient notice had been given by the commissioners to the parties interested. (a)

(a) See *Weems vs. Disney*, 4 H. & McH. 105, note (b.)

A witness cannot declare in evidence anything which was taken down in writing, as the deposition of a witness sworn before him, as a commissioner to mark and bound lands, inasmuch as the deposition itself would be better evidence. (a)

A commission to mark and bound lands, and the return thereof, permitted to be read in evidence, although five years has not elapsed since the recording thereof, to have what weight the jury think it deserves, but is not conclusive evidence.

A verdict may be given in evidence to have its weight with the jury, but it is not conclusive evidence.

TRESPASS *q. c. f.* upon a tract of land called Dispense. The defendant pleaded *non cul.* and issue was joined. The question of dispute between the parties was the true location of the tract of land called Dispense.

1. The plaintiff at the trial offered in evidence a deed from George and Leah Gale for a moiety of the tract of land called Dispense, without previously shewing their title to the land. The defendant objected to the reading of the deed in evidence, until the plaintiff had shewn that the grantors had a right to convey, because it was irrelevant to the cause.

THE COURT determined, that the deed might be read to the jury, but that the plaintiff must shew that the grantors had a right to make the conveyance, or \* the Court would direct the jury that **154** the deed was not evidence.

2. The plaintiff offered in evidence the record of depositions taken under a commission issued to perpetuate the bounds of land, agreeably to the Act of 1723, ch. 8. The defendant objected to the reading of the same, because it did not appear on the face of the record, (and no other evidence was offered,) that the commissioners acting under the commission, had "affixed public notes at the parish church," &c. agreeably to the proviso contained in the fourth section of the Act of 1723, ch. 8. The plaintiff's counsel replied, that as the commission, under which the depositions offered, were taken, was issued at the instance and on the part of the defendant's ancestor, under whom he claimed, the defendant was therefore estopped from any objections to them, although they might not appear on the face of them to be strictly regular.

THE COURT determined that inasmuch as the requisites of the Act of Assembly had not been complied with, the depositions could not be received in evidence.

3. The defendant produced a witness, who had been a commissioner for the purpose of taking depositions under a commission issued at the instance of the defendant to perpetuate the bounds of

(a) See *Nelm vs. Smith*, 4 H. & McH. 241.



his land, but which commission, or the depositions taken thereunder, had never been recorded, (by means of a caveat entered in the County Court for that purpose,) to prove certain matters which came to the knowledge of the said witness by means of the depositions; and he was asked to inform the jury anything which he might have heard respecting the head of a certain creek, while acting as a commissioner as aforesaid. The plaintiff objected to this testimony, as being only a circuitous mode of giving the depositions in evidence, which not being recorded, were now void.

\* THE COURT determined that the evidence was not admissible, and refused to let the witness declare any thing which was taken down in writing as the deposition of any witness sworn before him as a commissioner, inasmuch as the deposition itself would be better evidence. 155

4. The plaintiff offered in evidence the proceedings under a commission for marking and bounding the lands in question, under the Act of 1786, ch. 33, which commission had been issued and executed at the instance of the plaintiff, and to which the defendant had entered himself as defendant on the commission, but that five years had not expired since the execution and return of the said commission. The defendant objected to the reading of the said commission, and the proceedings thereunder, in evidence to the jury, because the Act of 1786, ch. 33, s. 5, did not contemplate such a commission being evidence, until five years had elapsed after the recording the return to the commission; and that it had never been determined that a commission under that Act could be read in evidence until the five years expired, when, it was admitted, it became conclusive.

THE COURT determined that the commission and return were admissible evidence to go to the jury to have what weight the jury might think it deserved; but that it was not conclusive evidence. That a verdict might be given in evidence, to have its weight with the jury, but it was not conclusive. Verdict for the plaintiff.

*Martin*, (Attorney-General,) *Key*, and *Dashiell*, for the plaintiff.

*Hammond*, *Harper*, and *J. Bayly*, for the defendant.

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\* GENERAL COURT, (E. S.) SEPT. TERM, 1801. 156

M'CAUSLAND vs. WALLER, *sp. ba.* of LEWIS.

Bail to be discharged from a *scire facias*, on motion, when the principal has been released under a bankrupt law.

SCIRE FACIAS to the present term, on a judgment rendered in this Court against the principal.

*J. Bayly*, for the defendant, produced a certificate of the discharge of Philo Lewis, under the bankrupt law of the United States, and moved that the defendant might be discharged from the *scire facias* as special bail of the said Lewis, inasmuch as he could not arrest the principal, and surrender him in consequence of the said certificate.

THE COURT thought it sufficient, and discharged the bail.

*Bullitt*, for the plaintiff.

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GENERAL COURT, OCTOBER TERM, 1801.

M'DONOUGH vs. TEMPLEMAN.

Where the agent of a corporation contracted in his own name, under seal, with another person, but it was stated in the body of the contract that the agent acted in behalf of the corporation, it was held that he was not personally liable. (a)

THIS was an action of covenant. The declaration stated, that by certain articles of agreement had, made, concluded and agreed upon, at, &c. on the 10th of January, 1797, between one Edward Burrows, of the City of Washington, for and on behalf of the said M'Donough, by the name of, &c. of the one part, and the said Templeman, in behalf of The George-Town Bridge Company, of the other part; which said articles of agreement, sealed with the seal of him the said Templeman, the said M'Donough brings here into Court, the date whereof is the day and year aforesaid and is in the words following, to wit: "It is agreed this 10th day of January, 1797, between Edward Burrows of the City of Washington, in behalf of Maurice James M'Donough of Charles County, of the one part, and John Templeman in behalf of the George-Town Bridge Company, of the other part, that the said Edward Burrows doth hire unto the said John Templeman, for the \* use of the said Bridge Company, **157** seven slaves, named as follows, to wit: Jem, &c. belonging to the said M'Donough, from the date hereof until the 25th of December next ensuing; and the said John Templeman doth agree to pay for each of the said slaves, from the date hereof until the said 25th of December next ensuing, sixty dollars, together with giving them sufficient board, lodging, clothing, and necessary medicine, and other attendance during sickness. The said John Templeman doth further agree to send off the said slaves at the expiration of the said term, in good clothing, and to allow Bob two and a half days four times in the year, to go to see his wife; the said sum of 420 dollars to be paid by the said John Templeman unto the said Maurice James

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(a) Affirmed in *Key vs. Parnham*, 6 H. & J. 421. Cf. *Sumwalt vs. Ridgely*, 20 Md. 107; *Haile vs. Pierce*, 32 Md. 327.

M'Donough, or his order, on the said 25th of December next, without any deduction for board or other articles, or for lost time, &c. In witness whereof, the said parties have hereunto set their hands, and affixed their seals, the day and year first above written.

"Signed, sealed and delivered, EDWD. BURROWS, (L. S.)  
in the presence of JOHN TEMPLEMAN, (L. S.)"  
Walter Smith."

*Averment.*—That the negro slaves were delivered, &c. and that the sum of 420 dollars was due and unpaid, &c. The defendant demurred generally to the declaration, to which there was a joinder.

The General Court overruled the demurrer, and gave judgment for the plaintiff. The defendant brought a writ of error, and the proceedings were removed to the Court of Appeals.

*Mason*, for the plaintiff in error, contended that the contract in this case was a contract with The George-Town Bridge Company, and that Templeman, the plaintiff in error, was not answerable in his individual capacity. The corporation cannot act except by an individual, and if such individual is to be held responsible in his private capacity, there would be no person who would act for the corporation. *Jones vs. Le Tombe*, 3 Dall. Rep. 384; *Macbeath vs. Haldimand*, 1 T. R. 172; *Thomas vs. Bishop*, 2 Stra. 955. In *Unwin vs. Wolseley*, 1 T. R. 674, it was adjudged, that a servant of the crown, contracting by deed on account \* of government, was not personally answerable; and that such was the law, whether the contract was by deed or parole. So in the case of *Hodgson vs. Dexter*, 1 Cranch, 345. 159

*Buchanan*, for the defendant in error. Admitting all the authorities cited by the counsel on the other side to be law, yet the judgment of the General Court ought to be affirmed. Two exceptions are taken to that judgment. 1st. That Templeman is not personally responsible; and 2nd. That McDonough is not a proper party to the suit.

1. The Act incorporating The George-Town Bridge Company, authorises the stockholders to meet and elect three directors to manage the concerns of the company. It is a corporation aggregate. The company may act by their directors, or they may contract by an agent. It does not appear that Templeman was their agent, or had authority to act for them. He describes himself as the agent; but he expressly stipulates that he will pay the money for the hire of the slaves. *Jones vs. Le Tombe*, 3 Dall. Rep. 384, does not differ from the case of *Macbeath vs. Haldimand*, 1 T. R. 172; *Thomas vs. Bishop*, 2 Stra. 955; *Hodgson vs. Dexter*, 1 Cranch, 345, is perfectly consonant to the case of *Macbeath vs. Haldimand*. A corporation aggregate can make no contract except under its corporate seal, or by an agent acting under a power of attorney, under the seal of the corporation.

*Com. Dig. tit. Franchise*, 12, 13, 14; *Harg. Co. Lit.* 94 b; *Wooderson*, s. 493; 1 *Bac. Ab.* 507; 1 *P. Wms.* 656; *Ld. Raym.* 1418; 2 *East*, 142.

Upon a conveyance of lands with a warranty, though the grantee does not sign, yet, as the name of the grantee is in the body of the deed, and the covenant is made to him, he may sue and recover upon the warranty, if it be violated.

*Mason*, in reply.

The Court of Appeals, at June Term, 1804, reversed the judgment of the General Court, being of opinion that the plaintiff in error acted as the agent of The George-Town Bridge Company, and did not by the contract make himself personally responsible.

## 164 \* GENERAL COURT, OCTOBER TERM, 1801.

### WHETCROFT'S Adm'r *vs.* DORSEY'S Ex'rs.

If in debt on judgment, the record of the judgment agrees with the declaration, it is sufficient, on a plea of *nul tiel* record, though by the book of costs, it appears that in the said judgment, there has been a mistake in the amount of costs for which the judgment was rendered.

DEBT upon a judgment obtained in this Court for damages and costs. The defendants relied upon the plea of *nul tiel* record. The record book, in which the judgment is recorded, and upon which this action is founded, was brought into Court, and it appeared that the judgment therein entered was for the precise amount of damages and costs as mentioned in the declaration in this cause. But by the book of costs also produced, in which the taxation of the particulars of the costs was made, it appeared, that in the addition thereof there was a mistake of a dollar less than the true amount. In the docket entry of the action and judgment, the amount of the costs is the same as mentioned in the record of the judgment, and as declared for by the plaintiff.

*Key* and *Shaaff*, for the plaintiff.

*Martin*, (Attorney-General,) *Ridgely*, *Mason* and *W. Dorsey*, for the defendants.

For the plaintiff it was contended: 1. That if the error was material, and could have been amended on a motion to the Court at which the judgment was rendered, it was now too late for the defendants to take advantage of it, since the judgment, as actually rendered, agreed with the one declared on. But that as the error was beneficial to the defendants, they could not have had it amended. For which were cited, 1 *L. Raym.* 594; 5 *Com. Dig.* 301; *Cro. Car.* 437; and 1 *Vent.* 60.

2. That if the error was a material one the plaintiff could amend his writ and declaration, not under the Act of Assembly, but under

the English Statutes, 14 Edwd. III, ch. 6; 8 Hen. VI, ch. 12, and ch. 15. For which were cited, 1 *Bac. Ab.* 90, 96; 1 *Com. Dig.* 337; 8 *Co.* 156; *Gilb. His. Com. Pleas*, 86, 94; and the following cases in the late Provincial Court, and in this Court, *Rasin vs. Ricketts*, April Term, 1770, *Reintzell \* vs. Neale*, October Term, 1793, and *Cawood vs. Green*, October Term, 1794. That it was not too late to amend **165** after *nul tiel* record pleaded, cited 1 *Bac. Ab.* 107, 108; 2 *Stra.* 846, 954; *Ld. Raym.* 669.

The General Court determined that there was a sufficient record of the judgment declared upon, and directed the judgment to be entered for the debt demanded, together with damages, (being the interest,) and costs.

The defendants appealed to the Court of Appeals, but at November Term, 1803, they dismissed their appeal.

## GENERAL COURT, OCTOBER TERM, 1801.

### BRISCOE *et al.* vs. WARD.

A writ will be issued from the Court of Chancery to compel the justices of the County Court to sign and seal a bill of exceptions tendered to them. (a)

A bill of exceptions may be taken to the opinion of the Court on any question decided relative to the practice adopted therein.

The County Court refused to receive the plaintiffs' declaration at the fourth term, and to lay a rule on the defendant to plead at that or the succeeding term, and wholly refused to continue the cause; on appeal, reversed.

Can a writ of *procedendo* be awarded in any case except where there has been a jury trial, and a reversal on a bill of exceptions?

**APPEAL** from Charles County Court. In this case the plaintiffs in the County Court, (the present appellants,) tendered a bill of exceptions to that Court, to be signed and sealed, which the justices refused to do; whereupon the plaintiffs obtained out of the Court of Chancery a compulsory writ, commanding the justices to sign and seal the said bill of exceptions. See the writ in 2 *Harr. Ent.* 675. The bill of exceptions was accordingly signed and sealed, and the whole proceedings, on the appeal of the plaintiffs, were transmitted to this Court; whereby it appears that the plaintiffs, (the appellants,) instituted their action on the case in the County Court to March Term, 1798, and that the defendant at that term appeared in proper person, gave special bail, and imparled. That at the next term, August, 1798, the parties again appeared, and a further imparlance was granted to the defendant. At the next term, March, 1799, the case was continued by consent of the parties, and by order of the Court, until

(a) Recognized in *Nesbit vs. Dallam*, 7 G. & J. 508, and in *Marsh vs. Hand*, 35 Md. 126. See *Alex. Br. Stat.* 133; 2 *Poe Pldg.* 310, 311.

August Term, 1799, when they again appeared, and the plaintiffs filed their declaration and cause of action, and moved the Court for a rule upon the defendant to answer thereto, agreeably to the rules of \* the Court; but the Court refused to grant such rule. The  
**166** plaintiffs then moved the Court for a rule upon the defendant to answer by the next term of the Court; but this the Court also refused to grant, or to take any other order of and upon the premises. The action was then by virtue of the Act of Assembly discontinued.

The bill of exceptions tendered to the Court by the plaintiffs' attorney, and afterwards signed and sealed by the justices in obedience to the command of the aforesaid writ from the Court of Chancery, stated that "the plaintiffs by their counsel, on the 23rd of August, 1799, during the sitting of Charles County Court, at that term, filed with the clerk of the said Court, the account of the plaintiffs against the defendant, and also the following declaration in the above cause, viz. [Here follows the declaration,] which the plaintiffs by their counsel, on the 30th of August in the year aforesaid, and during the sitting of the Court at the said term, prayed the Court to receive as their declaration in the said cause; but the Court refused to receive the same, and also refused to rule the defendant to plead during the said term, or by the plea day, or by any other time; and altogether denied a continuance of the said cause, although requested by the counsel for the plaintiffs to continue it; and likewise refused to make any other order, and directed the said clerk not to make any entry which might prevent a discontinuance, although the counsel for the plaintiffs, at the time of tendering the declaration aforesaid, offered and declared himself willing to submit to any terms the Court might think proper to impose, either to obtain a trial, or a continuance. To which conduct and opinion of the Court the plaintiffs by their counsel excepted, &c.

*Buchanan*, for the appellants.

*Chapman*. for the appellee.

The General Court reversed the judgment of the County Court, and remitted the record with a writ of *procedendo*, &c.

## **167** \* GENERAL COURT, OCTOBER TERM, 1801.

CARROLL *et al.* Lessee *vs.* E. & S. NORWOOD.

The time when a deed was recorded is a matter of fact to be determined by the jury. And when possession has been held under an ancient deed, the jury ought to presume that it was recorded within the time limited by law. (a)

(a) See *Lloyd vs. Gordon*, 2 H. & McH. 157, note; *Burke vs. Joe*, 6 G. & J. 136; *Shillknecht vs. Eastburn*, 2 G. & J. 115.

A deed for a moiety of a tract of land, describing it also by courses and distances, will convey only so much of the land as is included within the courses, although the same may be less than a moiety of the tract. (a)

When a defective deed has been located on the plats, evidence of possession under the same is admissible, although particular places of possession are not located. (b)

An ancient deed, not recorded in the county where the land lies, is admissible in evidence, without proof of its execution, if possession has been held under it. When possession has been held under a deed, the jury ought to presume livery of seisin of the land. (c)

Ancient bonds of conveyance admitted in evidence upon proof of the handwriting of the deceased witness thereto.

A deed, although located on the plats by the wrong name, may be read in evidence.

Evidence as to where a tree stood is not admissible, unless the place be located on the plats. (d)

Deeds are acknowledged and recorded only by virtue of the Act of Assembly; and a copy of a deed not required by law to be recorded is inadmissible in evidence.

When a deed has not been recorded within the time limited by law, a copy thereof is not admissible as proof of the original deed.

A misrecital of a deed as to its date is not material.

When the grantee in a defective deed is, at the time of the execution thereof, in possession of the land, under a bond of conveyance, such deed might operate to convey, as a release, the fee to the grantee, and a subsequent deed from the grantor to another person would be inoperative.

But such defective deed will not operate as a deed of bargain and sale, so as to affect the title of such other person, unless he had notice, &c. (e)

A deed recorded under a decree of Chancery has the same force as if it had been recorded in time, as against all persons not within the exception contained in the Act of Assembly. (f)

Defendants in an action of ejectment, after having taken a joint defence, are not permitted, at the trial, to sever their defence. (g)

If the adversary possessions of the defendant are not located on the plats, no evidence can be given of them.

The record of an ancient deed, which appeared not to have been signed by the grantor, but which was acknowledged by him, admitted in evidence.

Where A. has been in possession of land, for upwards of forty years, under a deed to him from B. a copy of an ancient deed, not enrolled in time, from C. to B. for the same land, though misrecited in the deed from B. to A. with the rent roll, entries, &c. are evidence sufficient for the jury to presume and find a deed from C. to B. (h)

(a) See *Norris vs. Pottee*, 4 H. & McH. 338.

(b) Cited in *Greenleaf vs. Birth*, 5 Peters, 136.

(c) See *Mattheus vs. Ward*, 10 G. & J. 448.

(d) Cited in the opinion of DORSEY, J. in *Funk vs. Hughes*, 5 Gill, 325, q. v.

(e) See *Hardy vs. Summers*, 10 G. & J. 816; *Baynard vs. Norris*, 5 G. 468; *Hudson vs. Warner*, 2 H. & G. 415; *Price vs. McDonald*, 1 Md. 403.

(f) Approved in *Pfeaff vs. Jones*, 50 Md. 272.

(g) See *Rev. Code*, Art. 64, secs. 16, 17.

(h) Cf. *Lannay vs. Wilson*, 30 Md. 551.

- A copy of a deed, not enrolled in time, made by a clerk under his seal of office, is entitled to no more credit than a copy taken by a private person.
- A judgment entered on a verdict for the plaintiff in ejectment, for land described as beginning at a point, (not located on the plats,) to be found by running a certain line, &c. being for land not described by any particular location on the plats, but which was included within the plaintiff's pretensions. (a)

EJECTMENT for a tract of land called Yates his Forbearance, lying in Baltimore County. The declaration contained seven separate demises, viz: from Charles Carroll, of Carrollton, for one-fifth, Nicholas Carroll, one-fifth, Daniel Carroll, of Duddington, one-fifth, Robert Carter, one-fifth, Abraham Van Bibber, one-tenth, Isaac Van Bibber, one-fiftieth, and William Smith, four-fiftieths. The defendants took defence on warrant for all the lands within the lines of The United Friendship, as located in two ways by the surveyor, as the pretensions of the defendants, on the plots returned in the cause. The cause came on for trial at May Term, 1801.

#### THE PLAINTIFF'S TITLE.

(A) Patent granted to George Yate on the 20th of July, 1684, for a tract of land called Yates his Forbearance, containing 770 acres, more or less.

(B) Will of George Yate, dated the 6th of June, 1691, by which he devised the said land to his two sons, George and John, in fee as tenants in common.

**168** \* (C) Deed from George Yate, (the son,) to John Israel, dated the 5th of July, 1712, for his one moiety or half part of the said land as above devised, which moiety is described by courses and distances, and stated as containing 382 acres. The time when the deed was recorded is not mentioned.

(D) Deed from John Yate to Joshua Sewell, dated the 1st of July, 1710, for 100 acres, part of the said tract, described by courses and distances.

(E) Deed from John Yate to Robert Chapman, dated the 5th of March, 1715, for 100 acres more or less, of the said tract, described by courses and distances. The time when the deed was recorded is not mentioned.

(F) Deed from John Yate to John Israel, dated the 29th of November, 1715.

(G) Will of John Israel, dated the 13th of January, 1723, whereby he devised 385 acres of the said tract, purchased of George Yate, and 182 acres thereof purchased of John Yate, being the remainder of Yate's Forbearance, to his sons John Lacon Israel, Gilbert Talbot Israel and Robert Israel, in fee, as tenants in common.

(a) See *Hammond vs. Norris*, 2 H. & J. 149.



(H) Deed from John Lacon Israel to George Buchanan, dated the 7th of July, 1731, for 151 acres, the easternmost part of the said tract of land.

(I) Deed from George Buchanan to Doctor Charles Carroll, dated the 11th of April, 1732, for the said 151 acres of land.

(J) Bond from John Lacon Israel to John Hurd, dated the 24th of December, 1730, covenanting to convey to the said Hurd 100 acres of land out of the said tract.

(K) Assignment of the said bond from John Hurd to Benjamin Tasker and Company, dated the 25th of February, 1745.

(L) Bond from John Hurd to Benjamin Tasker and Company, dated the 26th of March, 1747, reciting the above bond and assignment, and covenanting to deliver up to the said Tasker & Co. possession of the said 100 acres of land on the 10th of December, 1749.

\* (M) Deed from John Lacon Israel to Benjamin Tasker and Company, dated the 15th of June, 1750, for the said 100 **169** acres of land, which the said Israel had covenanted to convey to John Hurd by bond, which had been assigned by the said Hurd to the said Tasker & Co. This deed was recorded in the records of Anne Arundel County, on the 15th of June, 1750, and afterwards by decree of the Chancellor recorded in the records of the General Court on the 18th of December, 1794.

(N) Deed from Gilbert Talbot Israel to Doctor Charles Carroll, dated the 26th of June, 1732, for all the lands devised to the said Gilbert by his father.

(O) Deed from Robert Israel to Charles Carroll and Company, dated the 26th of August, 1743, for all the lands devised to the said Robert by his father, covenanting to be 275 acres of Yates his Forbearance.

(P) Deed from Robert Chapman, (son and heir of Robert,) to Daniel Dulany and Company, dated the 23d of December, 1749, for 100 acres of the said tract of land.

(Q) Deed from Joshua Sewell to Richard Colegate, dated the 12th of November, 1716, for 100 acres, part of the said tract, described by courses and distances.

(R) Will of Richard Colegate, dated the 8th of August, 1721, devising the said 100 acres to his son Richard Colegate, and to his heirs in tail.

(S) Common Recovery suffered by Richard Colegate in the Provincial Court at October Term, 1735, docking the estate tail on the said 100 acres of land.

(T) Deed from Richard Colegate to Charles Carroll and Company, dated the 29th of October, 1735, for the said 100 acres of land.

(U) Deed from Doctor Charles Carroll to Benjamin Tasker, Charles Carroll, Esquire, Daniel Dulany, and Daniel Carroll, of Duddington, dated the 25th of September, 1733, conveying sundry tracts of

land, and amongst others the land in question, to be held by all the above persons in company, &c.

(V) Will of Charles Carroll, Esquire, dated the 19th of June, 1780, devising his part of the said tract \* of land to his son Charles  
**170** Carroll, of Carrollton, one of the lessors of the plaintiff.

(W) Will of Charles Carroll, of Duddington, [son and heir of Daniel Carroll, of Duddington,] dated the 12th of March, 1768, devising his part of the said land to his son Daniel Carroll, of Duddington, another of the said lessors.

(X) Evidence, that Doctor Charles Carroll departed this life, leaving Charles Carroll, Barrister, his heir at law.

(Y) Will of Charles Carroll, Barrister, dated the 7th of August, 1781, devising his part of the said land to Nicholas Carroll, another of the said lessors.

(Z) Will of Benjamin Tasker, Junior, dated the 5th of October, 1760, devising all his lands to his father, Benjamin Tasker.

(AA) Will of Benjamin Tasker, dated the 15th of February, 1766, devising that all his lands be sold by Ann Ogle, Christopher Lowndes and Robert Carter, or the survivor of them.

(BB) Deed from Ann Ogle and Robert Carter to Daniel Dulany, dated the 14th of September, 1770, for the said part of the said land, which was devised to be sold by the said Tasker.

(CC) Deed from Daniel Dulany to Robert Carter, another of the said lessors, dated the 2d of December, 1786, for the last above mentioned part of the said land.

(DD) Will of Daniel Dulany, (named in the deed from Doctor Charles Carroll,) dated the 26th of February, 1752. In this will no mention is made of the land in dispute, nor is there any residuary devise. [It appears that on the 26th of November, 1759, Walter Dulany conveyed to Daniel Dulany all his the said Walter's undivided moiety or half part of and in a fifth part or share of and in a certain Iron Works, commonly called The Baltimore Iron Works, and all lands, &c. belonging to the said company, &c. That on the said 26th of November, 1759, Daniel Dulany conveyed to Walter Dulany one moiety, or full half part of all his the said Daniel's  
**171** right and interest \* in the said Iron Works, lands, &c.

reciting in the said deed, that the honorable Daniel Dulany, deceased, being seised and possessed of one-fifth part or share of the said Iron Works, &c. conveyed his said fifth part or share, and everything thereunto belonging, to his sons, the said Daniel and Walter, for and in consideration of the natural love and affection, &c. That the said Daniel and Walter, the sons, in virtue of the said conveyance, actually entered and became seised, &c. That the said Walter had executed a deed, bearing even date with this deed, conveying to the said Daniel in fee simple, all his the said Walter's undivided moiety or half part of the said fifth part or share in the said Iron Works, to the intent and purpose that the

legal right in the said whole fifth part or share of the said Iron Works might be vested in the said Daniel, in order that by the operation, vigor and effect of the said deed, and also of these presents, a partition or division might result, take place and be effectuated, and all right of accretion or survivorship be prevented or destroyed between the said Daniel and Walter, in respect of their interest, part or share, in the said Iron Works, both real and personal, &c.]

(EE) Deed from Daniel Dulany, son and devisee in the will of the said Daniel above mentioned, to his son Daniel Dulany, dated the 16th of September, 1772, for one-tenth part or share of the lands, &c. belonging to the Baltimore Company.

(FF) Evidence, that the lands conveyed by the last mentioned deed were confiscated to the State as British property.

(GG) Evidence, that Walter Dulany, son and devisee in the will of the said Daniel above mentioned, died intestate, and left a son and heir named Daniel, and that the lands which descended to the last mentioned Daniel, from his said father, were also confiscated to the State as British property.

(HH) Deeds from the Chancellor, acting on behalf of the State, to Abraham Van Bibber, another of the said lessors, one dated the 5th of February, 1787, and \* the other dated the 19th of September, 1792, for one-half of one-tenth of the said lands con- **172**  
fiscated as aforesaid, as the property of the said Daniel Dulany, of Daniel, and for one-half of one-tenth of the said lands confiscated as the property of Daniel Dulany, of Walter.

(II) Deed from the Chancellor as aforesaid, to Isaac Van Bibber, another of the said lessors, dated the 11th of October, 1792, for one-fifth of one-tenth of the said lands, confiscated as the property of Daniel Dulany, of Walter.

(JJ) Deed from the Chancellor as aforesaid, to William Smith, the other of the said lessors, dated the 12th of December, 1792, for four-fifths of one-tenth of the said lands, confiscated as last aforesaid.

(KK) Deed from George Yate to Thomas Cockey, dated the 23d of August, 1726, for 144 acres of the tract of land called Forbearance, and all his the said George's right, &c. as eldest son of his father, or under and by virtue of his father's will, &c.

(LL) Deed from Thomas Cockey to Daniel Dulany, Benjamin Tasker, Junior, Charles Carroll, Esquire, Doctor Charles Carroll, and Charles Carroll, son and heir of Daniel Carroll, of Duddington, dated the 29th of December, 1748, for 140 acres more or less, part of Yates his Forbearance, described by courses and distances.

(MM) Deed from John Lacon Israel to Charles Carroll, Esquire, Benjamin Tasker, Charles Carroll, son of Daniel, Charles Carroll, Barrister, Daniel Dulany, and Walter Dulany, dated the 17th of September, 1761, (reciting the former deed to Tasker, which by mistake was recorded amongst the records of Anne Arundel County,) con-

veying the same 100 acres, which had been covenanted to be conveyed to Hurd, &c.

#### BILLS OF EXCEPTIONS, &c.

1. The defendants objected to the deed (C) from George Yate to John Israel being read in evidence to the jury, it not appearing that the same was recorded within the time limited by law, and there being no evidence presented or offered to the Court or jury that  
**173** \* the said John Israel, or those claiming under him, ever did possess or hold any land in virtue of or under that deed.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.) The Court are of opinion that the time of recording the deed is a matter of fact to be decided by the jury; and if it appears to them that the possession of the land mentioned in the deed has been held according to the deed, the jury may and ought to presume the said deed was recorded within the time limited by law; and on that ground the Court admit the copy of the deed to be read to the jury, subject to the future direction of the Court in case such possession is not proved. The defendants excepted.

2. The defendants prayed the opinion of the Court and their direction to the jury, that the deed (C) from George Yate to John Israel is only competent to convey so much of the land called Yates his Forbearance, being the land mentioned in the said deed, and of which a part was thereby intended to be conveyed, as is included and comprehended within the lines expressed and specified in the said conveyance, even though the quantity so conveyed should be less than half the land included in the patent for the said tract.

The Court were of that opinion, and so directed the jury.

3. The deed (C) from George Yate to John Israel is located by the plaintiff on the plots returned in the cause, from A, to 6, to 11, to 21, to 22, to 23, and to A. The defendants objected to the reading the said deed in evidence to the jury, because it did not appear by the said deed, or by any other evidence produced, that the same had been recorded within the time limited by law; because there was no evidence produced to the Court or jury to shew that the said John Israel, or those claiming under him, ever possessed any lands in virtue of that deed; and because there being no possessions of the plaintiff, or those under whom he claims, located upon the plots returned in this  
**174** cause, as \* being within the lines of the land included within the said deed as located by the plaintiff, he the plaintiff could not be permitted to give any evidence of possession under the said deed.

CHASE, Ch. J. The Court are of opinion, that as the land, comprehended within the deed from George Yate to John Israel, is

located on the plots, the plaintiff may give evidence of possession of that land, although particular marks or places of possession are not located. The defendants excepted.

4. The plaintiff having, to shew title to the land mentioned in the declaration, produced and read to the jury the patent, wills and deeds, (A) to (I) inclusive, then produced and offered to read to the jury a deed (M) from John Lacon Israel, to Benjamin Tasker, dated the 15th of June, 1750, recorded in the land records of Anne Arundel County. But the plaintiff offered no evidence of the execution thereof, or of any possession of the land mentioned in the deed by the said Tasker, or those claiming under him. The plaintiff also produced and offered to read to the jury, a bond (J) from John Lacon Israel to John Hurd, with the endorsements (K) thereon. Also a bond (L) from John Hurd to Benjamin Tasker and partners. The plaintiff also swore Charles Ridgely of William, who deposed that Richard Croxall, a subscribing witness to the said assignment (K) and bond (L) was dead, and that he, Ridgely, believed that the signing of the name of Richard Croxall as a witness to the said assignment and bond, was the hand-writing of said Richard Croxall, deceased, having frequently seen him write.

To the reading of which last mentioned deed, and the two last mentioned bonds, the defendants objected, and prayed the opinion of the Court, whether the said deed and bonds were proper to be read as evidence to the jury in this cause.

CHASE, Ch. J. The Court are of opinion, that the deed from John Lacon Israel to Benjamin Tasker, being an ancient deed, is evidence to the jury, \* without proof of the execution, if the jury shall find the possession of the land has been held under the deed; **175** and that the jury may and ought to presume and find livery and seisin of the land, if they find the possession has gone and been held according to the deed.

The Court are also of opinion, that the bonds from John Lacon Israel to John Hurd, and from John Hurd to B. Tasker and others, are legal and admissible evidence in this cause, and proper to be read to the jury. The defendants excepted.

5. The defendants produced and showed to the Court a deed from the said John Lacon Israel to Edward Norwood, father of the defendants, dated the 28th of March, 1760, for "all his right," &c., "of and in a tract of land called Goshen, Addition and Cannon's Delight; also, all his right," &c. "unto any tracts or parcels of land devised to the said Israel by his father's last will and testament, or otherwise as heir at law, have become the property of him, the said J. L. Israel."

The defendants objected to the reading of the said deed (M) from John Lacon Israel to Benjamin Tasker unless the execution of the same was proved.

*S. Chase, Jun.* for the plaintiff, to shew that the deed may operate as a feoffment, and that every deed will operate to effectuate the intent of the parties, cited *Shep. T.* 84, 83; 2 *Wils.* 22, 75, 79; *Gill. L. E.* 103, 161; 13 *Viner*, 206; 1 *Roll. Rep.* 132; 1 *Wood*, 530.

*Mason, contra.* Two things are required—If the deed is to operate as a feoffment, it must be proved, and if possession has gone along with the deed, then livery shall be presumed, though it be not proved; but if possession has not gone along with the deed, then the livery upon the feoffment must be proved. *Loff's Gilb.* 105.

*Martin* (Attorney-General) for the plaintiff. The endorsement made on the deed by the clerk of Anne Arundel County is evidence of the deed's being 50 \* years old and the acknowledgment  
**176** before a justice of the Provincial Court is conclusive evidence of its execution.

CHASE, Ch. J. The Court are of opinion that the deed from John Lacon Israel to Benjamin Tasker, being an ancient deed, is evidence to the jury without proof of the execution, if the jury find the possession of the land has been held under the deed; and that the jury may and ought to presume and find livery and seisin of the land if they find the possession has gone and been held according to the deed. The defendants excepted.

6. The surveyor of Baltimore having certified that he had located for the plaintiff, upon the plots returned, a deed (E) from John Yate to Robert Chapman, dated the 5th of March, 1715, beginning at the end of the 6th line of Yates his Forbearance, at D, and running from thence to 19, to 20, to 16, and to D, as described upon the said plots, the plaintiff produced and offered to read to the jury the said deed from John Yate to Robert Chapman, whereby is granted, &c., all that piece or parcel of land lying on the N. side of Patapsco River, in the county aforesaid, beginning at a bounded gum, and running S. 160 ps. to a bounded black oak, then E. 100 ps., then N. 160 ps., then W. 100 ps. to the first tree, containing 100 acres more or less, being part of a tract of land called Yates his Forbearance. [The time when the deed was recorded is not mentioned.] The plaintiff also produced and offered to read to the jury a deed (P) from Robert Chapman to Daniel Dulany, dated the 23d of December, 1749—which deeds were produced and offered to be read to the jury, in order to make title to the land as located upon the plots in manner aforesaid from D to 19, &c. To which the defendants objected, because the said deeds, so offered to be read in evidence by the plaintiff, are not located upon the said plots. The plaintiff offered in evidence to the jury a sworn copy of the instructions delivered to the surveyor to lay  
**177** down the said deeds, viz: "Locate deed, Yate to \* Chapman, beginning at the end of the sixth line of the whole tract, thence running S. 160 ps., then E. 100 ps., then N. 160 ps. and thence to the beginning, correcting the variation by allowing one degree for

every twenty years from the date of the certificate," &c. The plaintiff offered to prove by a witness that he delivered to the surveyor the said deed from Yate to Chapman, with the instructions to lay the same down; as also the said deed from Chapman to Dulany.

CHASE, Ch. J. The Court are of opinion that the deeds from Yate to Chapman, and from Chapman to Dulany, are located on the plots; and they allow the same to be read in support of the location. The defendants excepted.

7. The plaintiff having located the deed (E) from John Yate to Robert Chapman, to begin at black D, as designated upon the plots, and to run from thence to 19, to 20, to 16, and to D, the defendants examined a witness, who had been sworn on the survey, as to the fence designated on the plots from red h to red k, and who gave evidence as to the making of that fence by the defendants. The defendants then, to disprove the beginning of the said deed from Yate to Chapman, so set up by the plaintiff as aforesaid at black D, offered to prove by the said witness the place where, about 15 years ago, there stood an ancient gum tree, marked as a boundary, with the letters RC upon it, which place is in the said line of fence from red h to red k, and near the letter red k; that at the time he saw the said gum tree it was then dead, and had the appearance of having been marked a great many years before that time, and that the said gum tree is now down and gone.

CHASE, Ch. J. The Court are of opinion that inasmuch as the gum tree, or the place where it stood, is not located on the plots, the evidence offered is inadmissible, and cannot legally be received. The defendants excepted.

\* 8. The plaintiff produced and offered to read in evidence to the jury the exemplification or copy of a deed (E) from John Yate to Robert Chapman, dated the 5th of March, 1715, under whom the plaintiff claims, by divers subsequent conveyances, the part of the said tract of land called Yates his Forbearance therein mentioned; and the plaintiff prayed the Court to allow the same exemplification or copy of the said deed to be read in evidence to the jury as proof of the original deed, although not recorded in time, as there are words in the said deed by which the same may operate as a deed of release, or of feoffment. **178**

*Ridgely*, for the defendants, contended that the copy ought not to be read in evidence to the jury for any purpose. He cited 14 *Viner*, 446; 12 *Viner*, 84, 121; *Co. Litt. s. 66, s. 365*; 2 *Freem.* 259; *Style's Rep.* 445; 3 *Lec.* 388; 2 *Bac. Ab.* 307, 308; 10 *Co.* 92; 3 *T. R.* 156; *Esp.* 774, 239; *Bull. N. P.* 256; 1 *Salk.* 269.

*Martin*, (Attorney-General) for the plaintiff, contended that an ancient deed, at common law, was good, although it had not been

enrolled within the time limited by law. *Hoddy vs. Harryman*, 3 *Harr. & McHen.* 381; 1 *Ventris*, 296; 1 *Salk.* 280; *Comb.* 247; 2 *Bac. Ab.* 308; 3 *Com.* 280; 3 *Lev.* 388; 1 *Ld. Ray.* 746; 1 *Mod.* 4; 6 *Mod.* 44, 45; *Ambler*, 247, 248.

CHASE, Ch. J. There is no instance of a deed's being acknowledged and recorded for safe custody; but all deeds are acknowledged and recorded under Acts of Assembly. Deeds of bargain and sale only previous to the Act of 1766, ch. 14, could be \* acknowledged **179** before a Judge or justices. A copy of a deed not requiring enrollment is not evidence to be read to the jury. A misrecital of deed as to its date is not material, other matter recited being certain. The Ch. J. cited 3 *Lev.* 387; 2 *Freem.* 259; *Viner, tit. Evidence; Statute* 10 *Ann. ch.* 18.

The Court are therefore of opinion that the copy of the deed from John Yate to Robert Chapman cannot be received in evidence as proof of the original deed, the same not having been recorded within the time prescribed by law. And in the opinion of the Court, the justices before whom the same deed was acknowledged had no authority to take the acknowledgment of a deed to be recorded for safe-keeping. The plaintiff excepted.

9. The plaintiff prayed the opinion of the Court, and their direction to the jury that if the jury are of opinion, from the evidence, that Benjamin Tasker, or Benjamin Tasker and Company, had possession, under assignment (K) from John Hurd, of the land and premises mentioned in the deed (M) from John Lacon Israel to Benjamin Tasker and partners, of the 15th June, 1750, at the time the same was executed, then the said deed operates to convey, as a release, the fee to Benjamin Tasker, and the deed to Edward Norwood in 1760 cannot operate to convey the same land.

THE COURT gave to the jury the direction as prayed.

10. The plaintiff gave in evidence to the jury the patents, wills, deeds, &c. (A) to (M) inclusive, which last deed (M) the Court ruled might operate to pass the land, if livery of seisin had been made thereon; and that livery of seisin might and ought to be, by the jury, presumed, if possession had gone therewith; or, that if the said Tasker was in possession of the land mentioned therein at the time the same was executed, then the same might operate as a deed of **180** release; and that the same being recorded under the \* decree of the Chancellor, it will have the same validity, as if it had been recorded within six months, against all persons who do not come within the exception contained in the Act of Assembly in such case made and provided. The plaintiff then offered in evidence the deeds, wills, &c., (N) to (MM) inclusive. He also gave in evidence the location on the plots in this cause of a tract of land called United Friendship, or The United Friendship, granted to John Larkin on



the 1st of September, 1687, and that the location thereof, as made by the plaintiff, was correct; and he shewed in evidence to the jury the grant of the said land. He also offered in evidence to the jury that the several deeds and wills heretofore mentioned were all duly executed, and that all the said deeds were recorded in time, except the said deed (E) from John Yate to Robert Chapman and the said deed (M) from John Lacon Israel to Benjamin Tasker. He also gave in evidence that the said deeds located on the plots, and the other locations thereon made by the plaintiff, are by him truly located. He also gave evidence that a division or partition had been made between the two devisees of George Yate, the patentee, of the tract of land called Yates his Forbearance; and also that a division or partition had been made between the devisees of the lands devised to them by John Israel. The plaintiff further offered in evidence to the jury, that in consequence of the said sale and bond (J) made by John Lacon Israel to John Hurd, the said Hurd entered into the possession of the said 100 acres of land mentioned in the said bond and condition thereof, and possessed and enjoyed the same until he made the assignment aforesaid (K) to Benjamin Tasker and Company, and the purchase money was paid to the said Israel; and that when the said Hurd so assigned his interest therein to the said Tasker & Co. he became the tenant of the said Tasker & Co. and held and possessed the said land as their tenant, and for their use, until some time in the last of the year 1749, when he delivered up the said land and the possession thereof, unto the said Tasker & Co., who \* entered 181 thereupon, occupied and possessed the said land, until some time in the year 1754, without any dispute; and that from that time until within about ten years past, the said Tasker & Co. have possessed and enjoyed the said land; and further, that the said deed (M) executed by the said John Lacon Israel to the said Benjamin Tasker, contains the same land, for the conveyance of which the said bond (J) was given, and was executed by the said John Lacon Israel to complete the title of the said Tasker & Co. therein, and to vest them with a fee simple estate therein.

And the defendants having offered in evidence to the jury the deed from John Lacon Israel, to Edward Norwood, dated 28th of March, 1760, as conveying to the said Norwood the same land included in the said bond (J) and the said last mentioned deed (M) to the said Tasker, and as giving him a title to the same, the plaintiff proved, that on the debt books the defendants are not charged with any part of the tract of land called Yates his Forbearance; and proved by the assessor of Baltimore County that no such land was given in by the defendants, as belonging to them, to be assessed; and that the lessors of the plaintiff are assessed for the whole of the said tract of land, and pay assessment for the whole thereof.

The plaintiff prayed the opinion of the Court, and their direction to the jury, that under the general expressions used in the said deed

to the said Norwood, no land could be intended to pass, except those tracts of land to which the said John Lacon Israel had a right at the time when he executed the deed to the said Norwood; and that it could not be the intent of either of the parties, that by those general words the land should be included and pass, which the said Israel had thus contracted to sell thirty years before, for which he had been paid, and which ten years before he had included in the deed (M) executed by him in 1750 to Benjamin Tasker, and of which the said Tasker, and Hurd from whom he purchased, had been in possession for about thirty years next preceding the execution of the said deed to the said Norwood. That those general \* expressions ought not to be construed so as to include the said land contrary to what was the evident intent of the parties, as that construction also would be to the injury of rights long acquired by the said Hurd and Tasker, and make the said John Lacon Israel guilty of fraud, and therefore that the said deed to the said Norwood could not be considered as passing the land so included in the deed (M) from the said Israel to the said Tasker.

CHASE, Ch. J. The Court are of opinion, that the deed from John Lacon Israel to Benjamin Tasker, cannot operate as a deed of bargain and sale, so as in any manner to affect the title of Edward Norwood, or those claiming under him, which Norwood acquired under the deed to him from John Lacon Israel; that deed operating, in the opinion of the Court, to pass the land described and mentioned in the deed from John Lacon Israel to Benjamin Tasker, unless Norwood had notice of the last mentioned deed at or before the time of the execution of the deed to him from Israel; and therefore the Court refuse to let the deed from Israel to Tasker be read in evidence to the jury as a deed of bargain and sale. The plaintiff excepted.

11. The plaintiff in this cause, having heretofore brought an ejectment for the lands in question, which was non-suited at May Term, 1799, after the present action was brought, to wit, on the 24th of September, 1800, the lessors of the plaintiff, by their agent William Hammond, entered into an agreement with Samuel Norwood, one of the defendants, "that the plots used in the former ejectment, which was tried between C. Carroll & Co. and E. and S. Norwood, shall be used in the cause now depending between the same plaintiffs and Samuel Norwood, each party having liberty to make such amendments to those plots as they may think necessary. That the admissions of boundaries, proofs, and depositions taken in the former cause between the same parties, shall be received in evidence in the same manner as if they had been taken in the present suit."

\* Before the jury were sworn in the present action, the said Samuel Norwood objected to the plots made out in this cause

being used against him, and prayed that the Court would permit him to sever in his defence, alleging that in consequence of the agreement aforesaid, he had not attended to make any defence on the present plots; which motion was overruled by the Court. After the jury was sworn, the said Samuel Norwood again produced the said agreement to the Court, and offered to prove that the defence in this cause, which appears to be a joint defence, was conducted and managed by Edward Norwood, the other defendant, alone; that he the said Samuel Norwood, either by himself or counsel, did not in any manner concern therein. The said Samuel Norwood prayed the opinion of the Court, and their direction to the jury, that the plaintiff was precluded under the agreement aforesaid, from recovering any land in the possession of the said Samuel Norwood.

The plaintiff shewed that every location on the plots in the former suit were transferred to the plots in this cause.

THE COURT refused to permit Samuel Norwood to sever in his defence, and refused to give the direction prayed. The defendant, (Samuel Norwood,) excepted.

12. The defendants offered to swear witnesses to the jury, to prove that they, the defendants, have been in the exclusive possession, by enclosure by fences, for more than twenty years next before the bringing of this action, of all the lands included within certain lines located, laid down, and designated on the plots returned in this cause, viz: beginning at, &c.

CHASE, Ch. J. The Court are of opinion, that as the defendants have not located their adversary possessions on the plots, such evidence cannot be admitted to the jury. The defendants excepted.

13. The defendants, to support title in themselves to a moiety of a tract of land called The United Friendship, produced and offered to read in evidence \* to the jury, a patent to John Larkin for the said land called The United Friendship, granted the 1st **184** of September, 1687; and also a paper, purporting to be a deed from John Larkin, son and heir of the patentee, to Edward Dorsey, dated the 25th of June, 1702; [and the record book in which the said deed is enrolled was also produced, and the defendants offered to read the said deed from the said record book.] It purported to be made between John Larkin and Thomas Larkin, of the one part, and Edward Dorsey, of the other part, for "all that moiety or half part of a tract of land called The United Friendship," &c. It does not appear to have been signed or sealed by either of the grantors. The name of "Thos. Larkin" is signed under those of the witnesses; and it was acknowledged by John Larkin, on the 27th of June, 1702, before two justices of the Provincial Court. There is no mention of the time of recording.

To the reading of which deed in evidence the plaintiff objected.

CHASE, Ch. J. The Court are of opinion, that the deed from John Larkin to Edward Dorsey is evidence, and they permit the same to be read to the jury. The plaintiff excepted.

14. The plaintiff offered to read in evidence to the jury, the enrolment of a deed (E) from John Yate, son and devisee of George Yate, the patentee of the tract of land called Yates his Forbearance, to Robert Chapman; and to prove that a deed, (of which the said last mentioned deed is a copy,) was executed by the said John Yate to Robert Chapman, the plaintiff offered in evidence to the jury the entries on the Rent Rolls in the Land Office, viz: "100 acres, (Yates his Forbearance,) Robert Chapman from John Yate, 5th March, 1715," &c. Also a deed (P) from Robert Chapman, the son and heir of the said Robert, to Daniel Dulany and Company, as a deed for the same 100 acres of land. And also offered evidence to prove

**185** that no other conveyance of any nature or kind was \* made or executed by the said John Yate to the said Robert Chapman, except the deed (E) of the 5th of March, 1715. And also offered in evidence to the jury the Debt Books in and for Baltimore County, in which the said 100 acres of land were charged to the Baltimore Company, consisting of the persons named in the said deed (P) from Chapman to Dulany & Co. And also offered in evidence the possession of the said Dulany & Co. from the date of the said last mentioned deed to within seven years last past, by actual cultivation of a part of the said land described in the said deeds (E) (P) of the 5th of March, 1715, and the 23d December, 1749, under and in virtue of the said title; and that the defendants did not claim any part of the tract of land named in the declaration, as part of Yates his Forbearance; and that no evidence of any nature was produced or offered on the part of the defendants to prove that the right or title of the said 100 acres, or any part thereof, was in the defendants or in any other person or persons than the said George Yate, John Yate, Robert Chapman, Daniel Dulany and Company, or those claiming under them.

The defendants offered in evidence the deed from John Lacon Israel, son and devisee of John Israel, to Edward Norwood, the father of the defendants, dated the 28th of March, 1760, hereinbefore mentioned; and also offered to prove to the jury possession of such part of the land as they have taken defence for on the plots in this cause, in Edward Norwood, the father, in his life-time, and in the defendants since his death, from the year 1757 to the present time, and possession of the same in the defendants at this time; and that the said Edward Norwood, the father, and the present defendants, respectively claimed and held the same under the said deed from John Lacon Israel to Edward Dorsey.

CHASE, Ch. J. The Court are of opinion, that if the jury find the facts stated by the plaintiff, and that Daniel Dulany and Company

have been in possession \* of the land described in the deed from Robert Chapman to Daniel Dulany and Company, from **186** the date of the deed to within seven years last past, that then the copy of the deed from John Yate to Robert Chapman, with the said facts, are sufficient evidence to induce the jury to presume and find a deed from John Yate to Robert Chapman, for the land described in the deed from Robert Chapman to Daniel Dulany and Company.

The Court are also of opinion, that the said copy is entitled to no more weight or credit than a copy taken by a private person.

Verdict.—The jury find, “that the beginning of Yates his Forbearance, the land mentioned in the declaration, is at the point to be found by running from the red letter B, as marked on the plots, N.  $4\frac{1}{4}^{\circ}$  W. 160 perches; that from this point the said land called Yates his Forbearance is to be located, according to the courses and distances expressed in the patent for the said land, with an allowance for variation of  $4\frac{1}{4}$  degrees; and the jury find for the plaintiff all the land within the lines of the land called Yates his Forbearance, as so located.”

Motion by the defendants in arrest of judgment. Reasons: “That no judgment ought to be given upon the verdict, because there is no finding in the said verdict sufficiently certain to authorize the Court to give a judgment.”

The motion was continued by the Court until the present Term, (October, 1801,) when it was withdrawn by the defendants' counsel, and a judgment was entered upon the verdict for the plaintiff, for possession, &c.

\* GENERAL COURT, OCTOBER TERM, 1801. **187**

PHILIPS *et al.* vs. M'CURDY.

Notice of the non-acceptance of a foreign bill of exchange must be given to the endorser in due time. (a)

What is due time is a question of law upon the facts of the case.

An endorser is not liable upon a bill of exchange, when he has not had due notice of its non-acceptance; and his promise to pay the bill is not binding. (b)

The endorser of a foreign bill of exchange held not to be responsible to the holder, because the latter had failed to give the former due notice of the protest of the same for non-acceptance, and had not presented the bill for payment, and protested the same for non-payment at the time required by law, and because the drawee, being the holder of the bill, could not legally protest the same.

(a) Approved in *Bell vs. Bank*, 7 G. 232. Cf. *Tate vs. Sullivan*, 30 Md. 464.

(b) Cited in *Whiteford vs. Burckmyer*, 1 Gill, 149. See *Beck vs. Thompson*, 4 H. & J. 531, as to waiver of notice.

ASSUMPSIT upon a foreign bill of exchange, with a count for goods, wares, &c. sold and delivered, and another on an *insimul computasset*. General issue pleaded.

The plaintiffs, at the trial, read in evidence a bill of exchange dated Virginia, 31st of May, 1797, and drawn by Alexander Macauley on Caspar Voght, Hamburg, for £300 sterling, and payable sixty days after sight to Hugh M'Curdy, the defendant, or order, which bill was endorsed by the defendant, payable to Philips, Oates & Co. the plaintiffs. The plaintiffs proved to the jury, that the defendant endorsed the said bill with his own hand, on the 31st of May, 1797, and paid and delivered the same to John Wilson, (who was the agent of the plaintiffs,) for and on account of the plaintiffs, in discharge of a debt due from him the defendant to them, they being foreigners and British subjects, then and still residing in Great Britain; and that the defendant then was, and still is a citizen of the United States, and of the State of Maryland, residing and using merchandize in the City of Baltimore. That the said Wilson remitted the said bill to the plaintiffs in Great Britain, on the 8th of July, 1797, and that it was received by them on the 9th of August, 1797, and by them remitted to Caspar Voght, of Hamburg, the person upon whom the said bill was drawn. That the said bill was protested for non-acceptance on the 12th of September, 1797, and is noted thereon on that day for non-acceptance; and it was also protested for non-payment on the 17th of November, 1797, which said last mentioned protest is as follows, viz: "On Friday, the 17th of November, 1797, at the request of Caspar Voght, Esquire, of Hamburg, merchant, I, Henry Marolf, notary public, by imperial authority lawfully admitted and sworn, dwelling in this City of Hamburg, demanded from himself payment of the bill of exchange, the copy \* whereof is hereunderneath written, speaking at noon  
**188** at the exchange, his proxy Mr. John George Burmester, who declared unto me that this bill could not be paid; therefore I," &c.

The plaintiffs then proved by the said Wilson, that the protests for non-acceptance and non-payment of the said first bill of exchange, which owing to the irregularity of the January packet of the year 1798, were received from the plaintiffs by the said Wilson at the same time, to wit, on the 13th of March, 1798; and that he the said Wilson, (who then resided in Philadelphia,) on the 14th of March, 1798, wrote a letter to the defendant, (who then resided and still resides in Baltimore,) enclosing to him the protest for non-acceptance, giving him notice of the protest for non-payment, and as the agent of the plaintiffs, demanding of him the defendant payment of the said bill of exchange with damages, interest and costs thereon and at the same time, and by the said letter advising the defendant that the said bill and protest for non-payment were in the hands of him the said Wilson, as the agent of the plaintiffs; which letter was, on the same day on which it bore date, put into

the post office; and that the defendant offered to pay to the said Wilson the principal sum mentioned in the said bill, provided the interest was relinquished.

The defendant then gave in evidence, from a treatise called *Kyd on Bills of Exchange* that twelve days of grace are allowed on bills drawn on Hamburg; also a letter from the plaintiffs to the defendant, dated at Leeds, the 9th of August, 1797, informing him that they had received, through the hands of John Wilson, £300 on account of the defendant, and which was placed to his credit; a second letter dated the 9th of October, 1797, stating that they had received through the hands of Wilson, on account of the defendant, 203l. 6s. 9d. sterling; a third letter dated the 30th of December, 1797, enclosing the defendant's account with them, stating a balance, with interest, 1,061l. 9s. 11d. sterling, due from him to them, in which account is a credit of £300 on the 27th of August, \* 1797; a fourth letter dated the 4th of January, 1798, saying that since their last they had received information from Mr. Wilson that £200 sterling had been paid by the defendant; and a fifth letter dated the 8th of February, 1798, announcing that they had on that day advice from Mr. Wilson of the defendant's having paid him on their account 209l. 5s. 0d. sterling, by a draft on H. D. Goverts of Hamburg, which, when in cash, should appear at the defendant's credit; and also a letter from the said Wilson to the defendant, dated Philadelphia the 14th of March, 1798, saying he had that moment received the enclosed protests for non-acceptance and non-payment of A. Macanley's bill on Caspar Voght, for £300 sterling paid to him in May last, on account of the plaintiffs, and that at the foot was a statement of the balance due, with interest, which he hoped the defendant would immediately remit, amounting to 316l. 19s. 10d. sterling; which letters and account were admitted in evidence by the plaintiffs. The defendant also proved, that the credit of £300 on the 27th of August, 1797, stated in the same account, was given on account of the said bill of exchange. Whereupon the defendant prayed the Court to direct the jury, that the defendant was not answerable to the plaintiffs in consequence of their laches in not giving him reasonable notice of the said bill being protested for non-acceptance, and in not having presented the said bill for payment, and protested it for non-payment at the time required by law; and because the said bill was protested by the said Caspar Voght, the drawee, as being the holder thereof.

*Cooke, Mason and Buchanan*, for the plaintiffs.

*Martin*, (Attorney-General,) and *W. Dorsey*, for the defendants.

In the argument the following authorities were cited, *Kyd on Bills*, 9, 137, 140, 151; *Chitty on Bills*, 140, 90, 158; 3 *Dall. Rep.* 365. 415; 2 *T. R.* 713; 1 *T. R.* 410, 713, 167, 712; 5 *Burr.* 2670.

\* CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.)  
Notice of the non-acceptance of a foreign bill of exchange must

be given to the endorser in due and convenient time, of which the Court are to judge. It is a question of law arising from the particular facts. An endorser is under no obligation to pay a bill of exchange where he has not had notice of its non-acceptance in due and convenient time, and his promise to pay the bill is not binding upon him.

The Court are of opinion, and so direct the jury, that the defendant is not responsible to the plaintiffs, owing to their laches in not giving him reasonable notice of the bill of exchange being protested for non-acceptance, and in not having presented the said bill for payment, and protested it for non-payment at the time required by law; and because Caspar Voght, the drawee, being the holder of the bill, could not legally protest the same. The plaintiffs excepted, and suffered a non-suit.

### GENERAL COURT, OCTOBER TERM, 1801.

#### DORSEY's Lessee *vs.* HAMMOND.

In all cases of ambiguity, arising on the face of a grant, as to the location of the land, the jury is the proper tribunal to decide the fact of location, which may well be ascertained in such cases by evidence *de hors* the grant. (a)

But where there is no ambiguity on the face of the grant, as to the location of certain lines, no evidence *de hors* is admissible.

A devise of a tract of land by name, and described as lying in B. County, passes the whole tract, although part of it lie in another county. (b)

The lines of an elder survey prevail over those of a junior survey, where they interfere.

Whether adversary possession must be by actual enclosures for twenty years before the action is brought.

The opinions of learned counsel, taken before bringing the action, cannot be read to the jury for any purpose.

EJECTMENT for a tract of land called Dorsey's Search, and The Resurvey on Dorsey's Search, otherwise known by the name of Dorsey's Search, lying in Anne Arundel County. The defendant took defence on warrant, and plots were returned. The points in  
**191** \* this case appear in the different bills of exceptions taken at the trial.

1. The question in the first bill of exceptions arose on the construction of the certificate and grant of a tract of land called Dryer's

(a) The case in the text is examined in *Howard vs. Moale*, 2 H. & J. 264; *Pennington vs. Bordley*, 4 H. & J. 459, 464, and *Clarke vs. Lancaster*, 36 Md. 205. It is cited in *Warner vs. Miltenerberger*, 21 Md. 274.

(b) See *Hammond vs. Ridgely*, 5 H. & J. 245; *Adams vs. Morrow*, 42 Md. 484.



Inheritance, which were offered in evidence by the defendant. The said tract was surveyed for Samuel Dryer, on the 25th of February, 1695, and the above certificate and grant stated it as "lying on the west side of the north branch of Patuxent River, beginning at a bounded red oak standing by the said branch, it being a bound tree of Thomas Brown's, and running N. 62° W. 86 perches, to a bound red oak in a branch, then N. 6° W. 362 perches, to a bound white oak, then N. 66° E. 120 perches, to a bound white oak standing by the said river, then bounding on the said river, running S. 5° E. 270 perches, then by a straight line to the first bounded tree; containing and now laid out for 254 acres of land, to be held of the Manor of Anne Arundel."

The plaintiff prayed the opinion and direction of the Court to the jury, that the legal construction of the said certificate and grant was, that wherever the jury should find the termination of the fourth line of the said grant; that is, the S. 5° E. 270 perches line to be, that from that termination the next line must be run a straight course to the first bounded tree, the beginning of the tract, and not with the meanders of the Patuxent River.

This prayer was resisted by the counsel for the defendant, who contended that the expressions in the said grant of Dryer's Inheritance, according to their natural import and grammatical construction, showed that the meaning of the parties was, that the said tract should bind with the river the two last courses; but at least that the expressions were ambiguous, and that the meaning and intent of the parties might have been, that the binding expressions should be confined to the first of the said two last courses, or should extend to both; and being ambiguous, their true meaning and intent must be determined by inquiring into the locations of the adjoining lands taken up in that neighborhood \* about the same time, and by the same surveyor; into the sense in which similar expressions **192** had been manifestly used in the certificates returned about the same time by the same surveyor; the understanding and sense of the grantees of the land, and adjoining lands, as proved by the manner they had entered upon and held their respective lands for a hundred years past, and had made improvements and buildings thereon; and by the understanding of Richard Ridgely, for whose use the present ejectment is admitted to be brought, and for whom, and under whose directions it is admitted, the survey of Dorsey Hall, on the 7th of February, 1794, (being in virtue of a special warrant to re-survey Dorsey's Search,) was made, and from all other extrinsic facts that might lead to illustrate the said expressions; which facts and circumstances, the counsel for the defendant offered to give in evidence to the jury.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurred.) The Court are of opinion, that it is the right, and within the jurisdiction of the

Court, to determine the construction and operation of grants. That what passes by the grant, and the quality of estate and interest created in it, is a question of law. The intention of the parties, which is to be collected from the words in the grant, must prevail, unless incompatible with some rule or principle of law. In determining the true construction of grants, the Court cannot resort to, or draw any aid from circumstances or facts extrinsic the grant, unless there is some ambiguity or uncertainty in the description of the person who is to take or the thing which is to pass. Where there is ambiguity or uncertainty in the description of the person or thing, evidence may be given of facts and circumstances *de hors* the grant, to ascertain the meaning of the parties, which then becomes a matter of fact, determinable by the jury upon such evidence as is legally admissible before them. The common instances adduced of uncertainty in the description of the person or thing, are where there are two persons of the same name, or two tracts of land of the same name. \* But these are only put as instances, and do not con-

**193.** fine the inquiry to those particular cases.

The Court are of opinion, that the meaning of the grant of Dryer's Inheritance is plain and obvious, and by no means ambiguous or uncertain; and that the true construction of that part of it which is in controversy, upon a view and consideration of the whole grant, is to run from the end of the line mentioned in the grant, to wit, south five degrees east, two hundred and seventy perches, with a straight line to the beginning, which is admitted by the parties on the plots as there delineated; and therefore the Court reject the evidence proposed to be offered to the jury by the defendant, as not legally admissible on the construction of the said grant; and the Court direct the jury to run from the end of the said line with a straight line to beginning. The defendant excepted, &c.

2. The question in the second bill of exceptions arose on the operation of a clause in the will of John Dorsey, the patentee of Dorsey's Search, dated the 26th of November, 1714, offered in evidence by the plaintiff, viz. "I give and bequeath unto my grandson John Dorsey, son of my son Edward Dorsey, deceased, my Patuxent plantation, and the land thereunto adjoining, called Dorsey's Search, lying in Baltimore County, to hold to him during his natural life; and from and after his decease, then I give, devise, and bequeath my aforesaid land and plantation, given him as aforesaid, unto the heirs of the body of my said grandson John Dorsey, to be begotten, for ever, and for want of such heirs, then," &c.

The defendant prayed the opinion and direction of the Court to the jury, that no part of the tract of land called Dorsey's Search, which was situate in Anne Arundel County at the time of the execution of the will and death of the testator, admitting the true location of that land extended over on the west side of Patuxent River,

passed by the devise contained in the will to John Dorsey, the grandson of the testator.

\* CHASE, Ch. J. The Court are of opinion, and so direct the jury, that the whole of the land included in Dorsey's Search, did pass and was vested in the devisee, John Dorsey, by the will of the testator, although partly in Anne Arundel and partly in Baltimore Counties. The defendant excepted, &c. **194**

3. The question in the third bill of exceptions arose on the construction of the certificate and grant of Dorsey's Search, the original, which was surveyed for John Dorsey on the 6th of December, 1694, and granted to him the 26th of March, 1696, and is stated in the said grant as "lying at Elk Ridge, beginning at three bounded white oaks standing by Patuxent River, and running and bounding on the said river N. 4° E. 87 perches, then N. 62° E. 50 perches, then," &c. &c. "then N. 1° W. 48 perches, to a bound white oak, by the river, then S. 47° E. 388 perches, to a bound white oak, then by a straight line to the first bounded white oaks, containing and laid out for 479 acres of land," &c.

The defendant moved the Court to direct the jury, that according to the true grammatical construction and evident meaning of the expressions used in the said grant of Dorsey's Search, (the original,) the said tract from its beginning to the second boundary ought to bind on the said river, and not to extend over the river to the westward so as to include any land on the west side of the river, and that the expressions, "and bounding on the said river," applied to the first course, were not in construction to be confined to that course, but to be extended to the whole of the courses stated to run from the first tree, the beginning, to the second tree by the river side.

CHASE, Ch. J. The Court are of opinion, that the true construction of the certificate and grant of Dorsey's Search, (the original,) according to the words and expressions therein, is to run the first course N. 4° E. 87 perches, binding the same on the river Patuxent, and all the subsequent courses according to the course and distance until you come to the course N. \* 1° W. 48 perches. This construction, in the opinion of the Court, is conformable to the **195** plain meaning of the words, and gratifies every part of the said certificate and grant, and is pursuant to the intention of the surveyor, to be collected from the words he has used. The construction contended for by the counsel for the defendant, disregards and rejects all the courses subsequent to the first, and cannot be admitted, there being no call or binding expression in either of the said courses; and therefore the Court refuse to give the direction prayed, to the jury. The defendant excepted, &c. Verdict and judgment for the plaintiff.

The defendant appealed to the Court of Appeals, and the case was there argued by *Ridgely, Mason and Shaafl*, for the plaintiff.

*Martin*, (Attorney-General,) *Key* and *Johnson*, for the defendant.

*Ridgely*, for the appellee. The opinion of the General Court is controverted by the counsel for the appellant in this case, on three different exceptions. 1st. On the construction of the grant of Dryer's Inheritance. 2d. On the operation of a clause in the will of John Dorsey, which will was dated in 1714; and 3d. On the construction of the grant of Dorsey's Search, the original. On the first point cited 3 *Wils.* 276; *Coup.* 47; *Bunb.* 65; 2 *Blk. Rep.* 1250. On the second point cited 2 *Burr.* 770; 3 *Ib.* 1541, 1574, 1622; *Coup.* 840, 871; 1 *Blk. Rep.* 377; 1 *T. R.* 596; 1 *Wils.* 247; *Gilb. Dev.* 17.

**200** \* *Martin*, (Attorney-General,) for the appellant, in reply, contended, that the decisions of the General Court, as given in the first and third bills of exceptions, as to the construction of the grants, were upon matters of fact for the jury to decide, and not for the Court, and should therefore have been left by the Court to the jury. If they had been left to the jury, he is satisfied a different decision would have been the result. In the case of *Martin's Lessee* vs. *Muse*, decided in the General Court on the Eastern Shore, the expression in the grant was "running down the stream," &c. and the jury found the course binding on the water. If the expressions are doubtful, surely the jury are to decide. *Helm's Lessee* vs. *Howard*, 2 *Harr. & McHen.* 57. Every course in the grant of Dorsey's Search, (the original,) binds on the river. It takes a departure from a tree on the river, and runs to another tree on the river. There are no stops in a grant, and the operation on the whole sentence throughout, by grammatical principle, will evidence that the expressions used were intended to denote that every course should run and bind with the river. Suppose the expressions "binding with the river," had been at the end of the grant, instead of the beginning, would they not have extended throughout? Last words do not mitigate preceding ones. Restraining words at the end or beginning bind the whole. *Siderfin*, 328. Again, the words "binding with the river," as used in this grant, should receive the same construction they would have received at the date of the grant. For words in ancient grants are to be expounded according to their ancient meaning. 4 *Com. Dig. tit. Parols*, (A. 1,) 383; *Cro. Eliz.* 905; *Lane's Rep.* 11; *Savil's Rep.* 124. And should be so construed as to carry into effect the intention of the parties by whom they are used. 4 *Com. Dig. tit. Parols.* (A. 18.) 387.

As to the second bill of exceptions. He contended that there was no distinction as to the manner of ascertaining the meaning of a will and of a deed. If a \* rectory lie part in one country, and **201** part in another, a transfer of it, stating it to be situated in the one county, will only pass the part so situated. *Moore's Rep.* 176, pl. 310. A grant of a manor in the county of M. which also

extends to the county of N. will only pass that part of it which lies in the County of M. 2 *Roll. Ab.* 50, *pl.* 8.

The Court of Appeals, JONES, POTTS, and DENNIS, J. (RUMSEY, C. J. and MACKALL, J. absent,) at November Term, 1803, delivered the following opinion, viz.

In this case there are three bills of exceptions presented for the decision of the Court.

We disagree with the General Court in the opinion and direction stated in the first bill of exceptions, concur with them in the opinion in the second bill of exceptions, and dissent from them in the opinion and direction stated in the third bill of exceptions; and therefore reverse their judgment in this cause.

In dissenting from the opinion and direction of the General Court in the first and third bills of exceptions, we do not mean to say that the expressions in the grant of Dorsey's Search bound that tract of land on the river Patuxent after the first line; or that the expressions in the grant of Dryer's Inheritance bound the last line thereof to the river Patuxent. In neither case are the expressions used, in our opinion, so plain and explicit as to exclude all doubt as to the location of those tracts of land; and in all cases of ambiguity arising on the face of a certificate or grant, as to the location of a tract of land, we consider the jury as the proper tribunal to decide the fact of location, which may well be ascertained in such cases by evidence *de hors* the certificate or grant.

In cases where no doubt or ambiguity exists on the face of the certificate or grant, as to the location, as in the case of the first line of Dorsey's Search, or fourth line of Dryer's Inheritance, called for and bounding on the river Patuxent, we think it within the province of the Court to say, that no evidence out \* of the certificate or grant shall be offered to the jury to prove that those lines 202 did not bound on and terminate on the river Patuxent, and thereby contradict the terms of the certificate or grant as to those lines.

A *procedendo* was then ordered; and at October Term, 1804, the cause came on again for trial in the General Court; upon which second trial,

4. *Mason*, for the plaintiff, prayed the opinion of the Court, and their direction to the jury, that if the jury are of opinion that the lines of the tract of land called Dorsey's Search, and those of the tract of land called Dryer's Inheritance, interfere with each other, those of the former tract must prevail over those of the latter—the date of the certificate of the former being prior to that of the latter.

The defendant's counsel did not oppose the direction prayed, but consented that it might be given; and

THE COURT gave the direction accordingly.

5. *Mason*, also prayed the direction of the Court to the jury, that the defendant, to make title to the land mentioned in the declaration by adversary possession alone, must show an adverse possession by actual enclosures, for a continued and uninterrupted series of twenty years before this suit was brought.

*Martin*, (Attorney-General,) for the defendant, said he should not object to such a direction, because the defendant in this cause did not mean to defend himself by possession.

6. *Key*, for the defendant, in his argument to the jury on the facts, offered to read to them opinion of the Hon. James Tilghman, (now the Chief Justice of the Second Judicial District,) given by him in the year 1773, whilst an attorney of the Provincial Court. But

**203** \* *Mason*, for the plaintiff, objected to the reading the opinion of Mr. Tilghman, or the opinion of any other gentleman, to the jury, on the subject now before them. For the Court of Appeals, in their opinion given in this case, have said that the location is a matter of fact for the jury, and it will not be said that the opinion offered to be read is evidence of any fact in the cause. Once admit such a practice, and no reason can be given why the opinions of the counsel engaged in the cause might not also be read, and for aught he knew they might be obtained for the occasion. Indeed, witnesses might be produced to prove that they heard such a lawyer say his opinion was that the location ought to be in such a particular way; and it will scarcely be objected that a verbal opinion would not be as good as a written one.

**205** \* *DONE*, J. said he had no doubt upon the subject, but as his brethren were absent, and the hour of adjournment had arrived, an opportunity would be afforded in the morning of having the opinion of a full Court upon the question. He thought the opinion should not be read to the jury. For what purpose, he asked, is it offered? Not as evidence, it is admitted; and surely nothing but what is evidence should go to the jury. It is not offered as law, being only the opinion of a gentleman, then an attorney of the Court. The Court of Appeals have said the location in this case is a fact for the jury alone to decide; nothing therefore but what is evidence going to the establishment of the fact can be admitted to the jury. The arguments of counsel are never read to the Court or jury as determining what the law is; the question as decided by the Court is only relied on.

The point was not renewed when the other Judges attended; and of course the opinion was not read.

Verdict for the defendant.

## GENERAL COURT, OCTOBER TERM, 1801.

## GOLDSMITH'S Adm'r vs. PATTISON'S Ex'r.

A sheriff cannot maintain an action for officers' fees placed in his hands for collection, unless he has paid the amount to the officer to whom they were due. (a)

**ASSUMPSIT.** The plaintiff's intestate had been sheriff to the County of Anne Arundel, and whilst he was sheriff, sundry officers' fees had been placed in his hands for collection against the defendant's testator, which fees had not been paid. The time allowed by law, within which sheriffs can execute for fees, having elapsed, this action was brought to recover the amount due from the defendant's testator. General issue pleaded.

*Shaaff*, for the defendant, contended, that the plaintiff, before he could recover, must prove that he or his intestate had paid to the officers the amount of the fees claimed in this action.

*Johnson, contra.* He did not suppose such proof was requisite, as the estate of the plaintiff's intestate, and \* the sureties in his sheriff's bond, were answerable to the officers if the fees have not been paid. 206

**CHASE, Ch. J.** A sheriff cannot maintain an action for officers' fees placed in his hands for collection, unless he has paid to the officers the amount of the fees claimed of the person against whom the action is brought.

## GENERAL COURT, OCTOBER TERM, 1801.

## SOMERVELL et al. vs. KING.

A plea of payment may be withdrawn at the trial Court for the purpose of pleading infancy.

**DEBT** on a writing obligatory. The defendant pleaded payment, and the cause was put at issue at the last term, and notice of trial given.

*Johnson*, for the defendant, at this term filed an affidavit, and moved the Court for permission to withdraw the plea of payment,

(a) See *Ott vs. Chapline*, 3 H. & McH. 196; *Mantz vs. Collins*, 4 Ib. 52; *Prather vs. Johnson*, 3 H. & J. 487.

for the purpose of pleading that the defendant was an infant when he executed the writing obligatory upon which this action is brought.  
1 *W. Blk. Rep.* 357.

*Mason*, for the plaintiffs.

THE COURT granted the leave.

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GENERAL COURT, OCTOBER TERM, 1801.

BULL'S Lessee *vs.* SHEREDINE.

Proceedings stayed in an action of ejectment, unless the costs recovered in a former ejectment between the same parties, are paid.

EJECTMENT. Notice of motion by the defendant's counsel at the last term to stay proceedings in this cause, unless the costs of the former ejectment between the parties, and wherein the plaintiff was non-suited, were paid.

THE COURT, at this term, ordered that the proceedings in this cause be stayed unless the costs of the former action of ejectment between the same parties are paid by the second day of the next term.

*Johnson and Montgomery*, for the plaintiff.

*Hollingsworth*, for the defendant.

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207 \* GENERAL COURT, OCTOBER TERM, 1801.

BRUNER *vs.* HEDGES.

The County Court has jurisdiction in an action of *assumpsit* for not delivering a sufficient quantity of superfine flour, produced from the plaintiff's wheat, sent to be ground at the defendant's mill, although the damages recovered were less than 10*l.*

APPEAL from Frederick County Court, from a judgment rendered in that Court in favor of the plaintiff, now appellee. It was an action of *assumpsit*, and the declaration stated that the plaintiff, Hedges, "delivered to the defendant in 1797 and 1798, 313 bushels of wheat, for which he received 54 barrels of superfine flour, and 2 barrels of common, only, whereas he ought to have received 63 barrels," &c. By agreement of counsel, no advantage was to be taken to the informality of the declaration, and all errors therein were released. The general issue was pleaded, and there was a verdict and judg-



ment for the plaintiff, for 8*l.* 16*s.* 0*d.* current money, damages, and costs, from which judgment the defendant appealed to this Court.

*Shaff*, for the appellant, contended, that the judgment ought to be reversed, being entered for a sum not within the jurisdiction of the County Court, under the Act of November Session, 1791, ch. 68, s. 9.

*J. Dorsey*, on the same side.

*Mason and Nelson*, for the appellee.

The General Court affirmed the judgment of the County Court, and the appellant appealed to the Court of Appeals, where the judgment of the General Court was affirmed at November Term, 1803.

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\* COURT OF APPEALS, NOV. TERM, 1801. 208

WORLEY *et ur.* vs. WALLING *et al.*

The Court of Chancery will compel the performance of a parol agreement, admitted by the parties to have been made or clearly proved to have been made and partly carried into effect. (a)

But it will not compel a conveyance, where a parent, long before the marriage of a child, promised if the child was dutiful, and married with the parent's consent, that upon such marriage he would convey a tract of land to the child, unless such promise was renewed anterior to such marriage, even though after such marriage the child was put in possession of a part of the land, and erected some improvements thereon.

APPEAL from a decree of the Court of Chancery, dismissing the bill of complaint. The bill states that the defendant, Walling, had several daughters, all of whom, except Ann, one of the complainants, had greatly disobliged him, in consequence of their intermarrying with persons whom he disapproved of. That he promised the said Ann, after the death of her mother, that if she would continue to reside with him, and behave with the prudence and propriety she had hitherto observed, and would conduct and manage his domestic concerns, and would never marry contrary to his inclinations, he would give and secure to her a tract of land, whereof he was then seised, in fee, lying, &c. called Old Fox Deceived, containing 169 acres. That the said Walling, after the said promise, frequently and publicly declared to divers persons, such intention. That in conformity to the wishes of her father, the said Ann did reside with him, and superintend his domestic concerns for several years. That she was addressed by Worley, the other complainant; and with the full and entire approbation of her father, she intermarried with Worley. That in pursuance of his said promise Walling put the

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(a) Approved in *Stoddert vs. Bowie*, 5 Md. 33; *Artz vs. Grove*, 21 Md. 470.

complainants in possession of the said tract of land. That they have made extensive improvements, &c. that Walling has since sold parts of the said land to the other defendants, who claim possession, &c. and that Walling hath also brought an action of ejectment for the residue, &c. Prayer for a conveyance in fee, &c. and for an injunction, &c.

The answer of Walling states, that three respectable persons were addressing his said daughter Ann, and he admits, that during that time he made a promise, that if she would marry either of them, he would secure to her the said land, but that she refused to marry either of them, and intermarried with Worley, contrary to his wish or consent; and he denies \* any other promise. That in **209** order that the complainants might do something for themselves, he put them in possession of the land, as tenants at will, without paying rent. That they have resided thereon about ten years, and have made some small improvements to the amount of one-fourth of what the said land would rent for, during that period. Denies that he ever gave any assurance that he intended the said land for his daughter, other than is before stated, so as to induce the complainants to make the improvements.

The answers of the other defendants deny any notice of the claim set up by the complainants, &c.

Testimony was taken under commissions, and the cause was argued, &c.

HANSON, C. (May Term, 1798.) The Statute of Frauds and perjuries he has ever considered as a most wise and salutary law, its object being to produce certainty in agreement, and to take care that men, on false suggestions, should not be compelled to perform things which they never stipulated to perform. The zeal indeed of the Legislature to prevent in future the impositions which had before been practiced, has been thought to have carried them too far. Hence it was, that although the law expressly declared that certain agreements, unless reduced to writing, should be void, the Court of Chancery has nevertheless compelled the performance of agreements, admitted by the parties to have been made, or clearly proved to have been made, and partly carried into effect. But in the present case, the alleged agreement between the parties, or rather the promise on a condition which has been performed, has not been proved. Perhaps it might be said, that there can be no agreement, unless both parties at the time of making it are equally bound. If one man says to another, "do this, and I will do that," is that other to have any indefinite time to determine on the proposition; and if, after years, he shall determine to do this, is he to have it in his power to **210** bind the proposer without any further \* conference on the subject? No! he is to come to the proposer and say, "You once made such a proposal; if you are still willing to abide by it, say

so, and I will perform what you proposed." Did Worley, or his wife, act in this way? No! Is there any satisfactory proof of the father's consenting to the match, and telling the couple "they should have the land in case they join the marriage?" No. Much stress has been laid on Walling's putting the couple in possession after their marriage, as if this could not be done, unless in pursuance of a former engagement to make the daughter a tenant in fee simple. But since the time of passing the Acts relative to deeds, no inference is to be drawn from the merely suffering a man to take possession of land, except that he is to be a tenant at will. Decreed, that the bill be dismissed without costs. From which decree the complainants appealed to this Court.

*Mason* and *Shaaff*, for the appellants.

*Key*, for the appellees.

The Court of Appeals at this Term affirmed the decree of the Court of Chancery.

## COURT OF APPEALS, NOV. TERM, 1801.

### BEALL vs. PRATHER.

The defendant executed in 1782, a bond conditioned to convey certain land to the complainant. On a bill filed in 1798, for a specific performance of the contract, equity refused to enforce the same, but remitted the complainant to his remedy at law on the bond.

APPEAL from the Court of Chancery, decreeing a specific performance of an agreement to convey land. The bill, which was filed on the 25th of February, 1798, states that Beall, the defendant in the Court below, (the present appellant,) being seised of a tract of land called Godfather's Gift, containing, by the representation of the said Beall, 140 acres, contracted to sell, and did actually sell the same to the complainant, (Prather,) on the 31st of August, 1782, who paid him one dollar as earnest money, and Beall, on the same day, executed a bond of conveyance under \* his hand and seal, thereby agreeing to convey to Prather the said tract of **211** land. That Prather was to give Beall £600 for the land; and on the 1st of August, 1782, he gave his bond to Beall, thereby binding himself to pay the said £600; one-half thereof at Christmas day next succeeding, and the remainder at some subsequent period. That some short time before the execution of the bond of conveyance, Beall sold to one Lucas about 27 acres of the said land, of which he did not give Prather notice. That Prather, discovering the said 27 acres had been sold, Beall proposed to make a deduction for the same out of the first payment, and to that effect wrote Prather a letter, dated 20th January, 1783, signed "James Beall." This letter

stated the quantity sold to be only 24 acres. That in consequence of the said letter, Prather went to Beall to settle and adjust the business, but that Beall refused to perform his engagement in that respect. That Prather then made an actual tender of the first payment, being £300 in specie, but Beall refused to receive the same. That Prather is now ready to pay, &c. That Prather had, at the request of Beall, paid him several small sums of money in part payment of the said land, as by an account filed. That Beall has always remained in possession of the land, and received the profits, &c. and has always refused to convey the same to Prather, or any part thereof. That he Prather, hath always been, and still is willing to comply with his contract, by payment of the purchase money, but claims a deduction for the land sold to Lucas. Prayer for a conveyance of the land, and for an account of the profits, and the sales of the timber.

The answer of Beall states, that he called at the time mentioned in the bill at the house of the complainant, and there got intoxicated; that during his intoxication, he supposes, he might have agreed to sell the land stated in the bill, but he does not know that he did, neither does he admit the paper exhibited, [the bond of conveyance,] to be his act and deed. The said paper, on inspection, having \* evident marks of fraud and imposition, for he says **212** that he can write legibly, and to all contracts by him made he always signs his name fairly, and at length, without being obliged to make his mark only. That no part of the consideration was ever paid to him as earnest, to his knowledge or belief. That the complainant well knew, at the time of the supposed contract, that he Beall, had no right to the land claimed by Lucas, and that Lucas had purchased it long before of the defendant's brother, and not of the defendant. That on his return home, after getting sober, he was informed that he had been drawn into a contract for the sale of his land to Prather, he however concluded, notwithstanding the gross imposition and fraud which had been practised upon him in his moments of intoxication, to let the complainant have the said land, provided he complied in making the payments agreeably to contract. That by the bond exhibited, executed by the complainant, he was to pay the defendant £300 on the Christmas following, and the residue, with interest, at any future day. That after waiting about two years, the defendant went to the complainant's house, and offered to him, and did actually tender, a deed for the said land, provided the complainant would pay him the consideration money, which the complainant refused to do. That the complainant never did tender to him £300 as alleged; neither did he the defendant ever receive one farthing from the complainant as part consideration for the said land. He does not recollect signing the letter exhibited, fifteen years and upwards having elapsed since the date of it. That he has constantly been in the uninterrupted possession of the land, and no

steps have ever been taken by Prather to comply with his supposed contract. That owing to the Federal City being within 10 miles of the land, it has greatly increased in value, and that is the sole cause why the complainant wishes to set up and establish a claim to the same, after letting it remain dormant and unfulfilled on his part for upwards of sixteen years. He relies on this long lapse of time \* and the complainant's non-performance of his part of the said supposed contract, together with the circumstances of **213** fraud and imposition manifestly apparent in the conduct of the complainant, as a sufficient justification for not conveying the said land to the complainant, which the defendant does not wish to do, he not being obligated, upon any principle of equity or justice, to a specific performance of the said supposed contract at this distance of time, since the alleged execution thereof. Prays to be dismissed, &c.

Testimony taken, &c. which appears to be correctly stated in the decree and arguments of counsel.

HANSON, C. The facts appearing from the proofs in the cause are as follow: In the year 1783, James Beall, a man much addicted to drink, but at that time sober, contracted with Nathan Prather to sell, and with a general warranty to convey to him, a tract of land called Godfather's Gift, for the sum of £600; some time after the contract, Beall sent Prather a letter, offering to make a deduction on account of 24 acres, which he had before conveyed to another person; but has never manifested an intention of performing his agreement; neither party has at any time done what ought to have been done, by a man meaning to carry his contract fairly into execution; a sham tender of money indeed is made by one, and an improper deed is tendered by the other; and then at least ten years elapse without any thing done, or offered to be done by either; although it does not appear that Prather relinquished his bargain, or that Beall had reason to believe he would give it up. After this lapse of time, they come to a verbal agreement that Prather pay the money, according to contract, and that Beall at the Christmas following, viz: Dec. 25th, 1785, deliver possession, provided that if he could not provide himself a place, his stock and father should remain on the land. In making this parol agreement, it seems that Prather gave up his claim to a deduction on account of the 24 (or as he says 27,) acres, conveyed to another person, and on account of the small payments made in 1783.

\* Although little has been said of this parol agreement, **214** and it is not stated in the bill, the Chancellor conceives it of great importance. It removes the objection of lapse of time, dormant contract, and imposition in obtaining the written contract, and may be also considered as settling all questions respecting the interest of the purchase money on one side, or waste and profits on the other side.

The Chancellor does not recollect any decision expressly in point, but inasmuch as it is clear from the books, that the parties to a written contract may rescind or dissolve it by a subsequent verbal agreement, he cannot doubt the propriety of considering a subsequent verbal agreement as confirming or even renewing a written contract, notwithstanding any lapse of time, or change of circumstances, which may have taken place since its date. The only doubt that the Chancellor can entertain is, whether or not the subsequent verbal agreement ought not to have been made a part of the case, and have been stated in the bill. However, as the evidence respecting it has not been objected to, and as without being considered as a part of the case, it certainly tends to establish the pretensions of the complainant, and places things on a fair footing between the parties, the Chancellor does not hesitate to make it the foundation of his decision.

Under all the circumstances therefore of the case—Decreed, that in case the complainant shall, on or before the 15th of January next, bring into this Court, to be paid to the defendant, or shall pay to the said defendant, the sum of £600, the said defendant shall thereupon, by a good deed to be acknowledged and recorded agreeably to law, give, grant, bargain and sell, to the complainant, and his heirs, the tract of land in the bill mentioned, called Godfather's Gift, and all the right, title, interest and estate therein, of the said defendant. But in case the said complainant shall not bring in the said money to be paid, or pay it as aforesaid, on or before the said 15th day of January next, the contract in the bill stated, shall and \* it is hereby  
**215** declared to be null and void. Provided that the complainant be at liberty notwithstanding, to pursue his remedy, (if any he shall have,) at law, against the defendant, for the non-performance of the condition of his bond passed for conveyance of the aforesaid land.—It is further decreed, that each of the parties bear his own costs. From which decree the defendant appealed to this Court.

*Martin*, (Attorney-General,) and *Ridgely*, for appellant.

*Key* and *Shaafl*, for the appellee.

*Ridgely*, for the appellant, contended that the agreement had been fraudulently obtained from the defendant at a time when the complainant had contrived to intoxicate him; that the land was worth more than the price agreed upon; that the complainant had neglected to perform his part of the agreement; that the value of the property had greatly increased since the signing of the bond, and that the contract was not such an one as equity would enforce. He cited 1 *Fonb.* 384, 385; *Gilb. on Eq.* 43; *Finch*, 538, 575; *Talb. Eq. Cases*, 236; 3 *Bro. Ch.* 640; 2 *Bro. Parl. Ca.* 396; 2 *Eq. Ab.* 18, pl. 7; 1 *Pow. on Com.* 29, 30; 1 *Ch. Ca.* 202; 1 *Ves.* 19; 21 *Vin.* 541; 3 *Atk.* 386; 1 *Vern.* 229; 2 *Vern.* 136; 2 *Pow. on Con.* 273.

*Shaaff*, for the appellee, cited 1 *Pow.* 29; 2 *P. Wms.* 131, 294; 1 *Ves.* 30; *Eq. Ca. Ab.* 58; 1 *Fon.* 320, 322, 384; 5 *Vin.* 534, *pl.* 8; 1 *Eq.* 26; 2 *Vern.* 127; 1 *Atk.* 12; 2 *Pow. on Con.* 232, 272; 2 *Ves.* 450.

The Court of Appeals, MACKALL, JONES, POTTS and DENNIS, Judges, (RUMSEY, Ch. J. did not attend,) at this term, reversed the decree of the Court of Chancery, with costs to the appellant—and decreed, that the Chancellor dismiss the bill of complaint, and that each party pay his own costs incurred in the Court of Chancery. Provided that the appellee be at liberty, notwithstanding, to pursue his remedy at law, (if any he shall have,) \* against the appellant, for the non-performance of the condition of his bond, **224** passed for the conveyance of the aforesaid land. That the Court of Chancery, shall give the necessary and proper directions for carrying this decree into execution.

#### COURT OF APPEALS, NOV. TERM, 1801.

CARBERRY *et ux. et al.* vs. TANNEHILL *et al.*

A contract must in all respects be full, fair and honest, in the beginning, and the performance of it fairly and conscientiously required, or the Court of Chancery will not enforce it. (a)

If two persons agree about the purchase and sale of land, the quantity of which is understood by each to be 300 acres, but from a real mistake of the scrivener, only 200 acres are conveyed, and the mistake is discovered, and both parties are apprised that there are in the tract 400 instead of 300 acres, on which quantity the price had been fixed, the Court of Chancery will not decree the surplus 100 acres; and there being circumstances proving the bargain a hard one, it will not enforce the contract as to the other 100 acres.

APPEAL from a decree of the Court of Chancery, dismissing the bill of complaint praying for the specific performance of an agreement to convey land. The facts appear in the decree of the Chancellor.

HANSON, C. (11th of February, 1801.) The jurisdiction exercised by this Court with respect to agreements, although long since settled, seems to be little understood. The great leading principle is, that whether or not this Court, on application, will compel a specific performance of a contract, is a matter of sound discretion, on consideration of all the circumstances, and from those circumstances it must appear, not only that the contract was in all respects full, fair and honest in the beginning, but that the performance of it may

(a) Approved in *Cherbonnier vs. Evitt*, 56 Md. 295; *Waters vs. Howard*, 1 Md. Ch. 117; S. C. 8 Gill, 283.

be fairly and conscientiously required. This Court will not otherwise enforce it. The defendant Tannehill, a minor, it seems, had from his deceased father a patrimony, which to judge from the contract he made with the complainant, was worth only £1,900, and during the few years of his minority the complainant, Schnertzell, made him a debtor to the amount of nearly one-half his fortune. About twelve months before his arrival at age, Schnertzell enters into a written contract with him for the purchase of his land. But the youth, although illiterate and weak, finds that he cannot reasonably be required to perform the contract. He cannot be compelled to do so, and the contract is given up. On his arrival at age, another contract is proposed; the same price is to be paid for the land; but the mode of payment is to be \* different. The contract is made, but not reduced to writing. In consequence of it, Tannehill executes a conveyance; the account of Schnertzell for articles furnished during Tannehill's minority, to the amount nearly of one-half of his fortune as before mentioned, having been deducted from the price. It appears from the evidence, that several articles in the account are charged at an unreasonable price; and that at the time of the contract, the land was worth more than £7 per acre; that is to say, that 336 acres were worth more than £2,352. But it seems that only 291 acres were conveyed (which at the aforesaid rate, were worth above £2,037,) instead of 336 acres, which quantity, according to Tannehill's idea, he had agreed to sell, and was the whole he possessed. It appears further, that 336 acres were the quantity contemplated by the parties when treating on the sale. Well—Schnertzell having had his account against the minor allowed in full, and having secured 291 acres, now insists that inasmuch as he meant to purchase, and Tannehill thought he had sold, all the land he possessed, he shall convey all the residue not conveyed, although that residue with the land conveyed, makes up 365 acres; and that the other defendant, Davis, who had purchased the residue, or part thereof, with notice, shall also convey.

There is reason to believe that Tannehill's title papers had been put into the hands of Faw, who acted as scrivener, and it is stated that he nevertheless made a mistake in the deed. But possibly that mistake might have been beneficial to his employer; because if the deed had mentioned and described all the three parcels, of which Tannehill's land consisted, and if Tannehill possessed the least share of discretion, he would have read, before he signed and sealed, and would thence have discovered his title to more than one parcel, and to a greater quantity than 336 acres. Now putting the case as fairly for Schnertzell, as the bill, answer, and testimony can possibly admit, it amounts to this—The parties agree about the purchase and sale of land, the quantity of which is understood \* by each to be 336 acres. From a real mistake of the scrivener, only 291 acres are conveyed. Schnertzell discovers the mistake, and



both parties are apprised that there are in three parcels held by Tannehill 365 acres, instead of 336 on which quantity the price had been fixed. On what principle shall this Court then give Schnertzell the surplus of 29 acres? Supposing the whole 365 acres, instead of 336, to have been conveyed, would it not be reasonable for this Court, on Tannehill's application, to grant him relief? Certainly it would be so! and therefore it cannot be reasonable to decree Schnertzell the surplus he sues for.

Taking all the circumstances, as they are already stated, this case has not that complexion which entitles Schnertzell to any kind of relief from this Court. The circumstances indeed are such that he may consider himself sufficiently successful in having secured a legal title to the 291 acres.

To show that he decides on settled principles, the Chancellor only refers generally to the books on the head of bargains, &c.

Decreed that the bill be dismissed, with costs to the defendants.

*Key* and *Johnson*., for the complainants.

*Martin*, (Attorney-General,) and *Shaafl*, for the defendants.

The complainants appealed to this Court; but the case having been compromised, the appeal was dismissed at this term.

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\* COURT OF APPEALS, NOV. TERM, 1801. **227**

SCOTT *et ux.* vs. DORSEY'S Executors.

To a bill filed by a legatee against executors for payment of a legacy, bequeathed to be paid out of the personal estate, if sufficient, if not, then out of the proceeds of certain lands to be sold, there was a demurrer stating that the personal estate being insufficient lands were directed by Act of Assembly to be sold, and other persons, with the executors, were named as trustees to make the sale, &c. and who are not made parties. Demurrer overruled, and defendants directed to answer. They answer, that the personal estate, and that part of the real estate sold, were insufficient to pay the debts and legacies: and an account directed to be stated at the instance of complainants.

*Per* HANSON, C.

The auditor, in stating an account on such a bill, is not concluded by an allowance made to the executors by the Orphans' Court in an account settled there; but where the articles allowed by the Orphans' Court were proper to be allowed, equity will not require any further evidence in regard to them, than the production of the account passed by the Orphans' Court. (a)

Executors are not allowed interest on debts by them paid after the testator has been more than twelve months dead.

Executors are entitled to be credited with the amount of any fair judgment or decree against them, although they may have appealed therefrom.

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(a) Approved in *Owens vs. Collinson*, 3 G. & J. 37.

As to the time when interest on a legacy, and the balance in the hands of the executors shall commence. (a)

The executors are accountable for money received by them from the sale of real estate of the testator, which was charged with the payment of legacies, where the executors and others were appointed, by an Act of Assembly, trustees to make the sale.

The executors are entitled to an allowance for the thirds of the widow of the testator, she having renounced the will, and also for the full amount of the specific legacies, whether paid or not, which legacies are to be credited at the amount of the appraisement.

Executors are not to be allowed for articles furnished for the support of the family of the deceased.

It is the province of the Orphans' Court to determine on an allowance of extra commission to executors for extraordinary trouble.

Executors who received continental paper money, in payment of property sold by them, are to be charged with it according to its proper value in current money.

APPEAL from a decree of the Court of Chancery, on the part of the complainants in that Court. The bill, which was filed on the 1st of December, 1789, stated that Caleb Dorsey, the defendants' testator and grandfather of Elizabeth Goodwin Dorsey, now the wife of Scott, (the complainant,) being seised and possessed of a considerable real and personal estate, by his will, dated the 14th of March, 1772, bequeathed to the said Elizabeth the sum of £500 sterling money, to be paid to her at the day of her marriage, or when she should be 21 years of age, as should first happen; and that if his personal estate should not be sufficient to pay the legacies mentioned and bequeathed in his said will, that then his lands called Dorsey's Delight Enlarged, Timber Ridge, his part of the land called Mill Frog, and his part of the furnace and works at Curtis' Creek, and his part of the lands taken up and purchased for the use of the same, should be sold, and the money arising from the sale thereof, should be applied to pay the legacies mentioned and bequeathed in and by his said will; and he appointed the defendants his executors, &c. That the testator died in the year 1772, and that the executors took possession of the personal estate to the amount of, &c. and took possession of and sold the real estate so devised to be sold, &c. That in the month of May, 1788, the said Elizabeth, intermarried with John Scott, one of the complainants; and that the executors refused to pay the said legacy of £500 sterling money, with interest thereon, from the time of the death of the testator. Prayer for relief, &c.

The answers and demurrers of the defendants admit the will of Caleb Dorsey, and the bequests of the legacy, &c. but state that the personal estate of the testator was not sufficient to pay the debts and \* legacies, and that in consequence thereof an Act of  
**228** Assembly was passed at November Session, in the year 1773, for the sale of the lands of the testator for the payment of said lega-

(a) See *Swearingham vs. Stull*, 4 H. & McH. 32.

cies, and sundry persons were by said Act authorized to make such sale, which persons are answerable to the complainants, and not the defendants, as executors, they having no assets in their hands for the purpose; wherefore, for want of sufficient parties to the said bill of the complainants, the defendants demurred, &c.

HANSON, C. At December Term, 1792, overruled the demurrers, and directed that the defendants should answer over.

The defendants at February Term, 1793, answer, that the testator bequeathed pecuniary legacies, including that to the female complainant, to amount of £10,000 sterling money; that the personal estate amounted to 8,383*l.* 12*s.* 0*d.* Maryland currency, exclusive of debts, and that the negroes, and other specific legacies, amounting to 3,244*l.* 5*s.* 6*d.* Maryland currency, were a part of such personal estate, which negroes and legacies were delivered and paid by the executors to the several legatees to whom they were bequeathed. That Priscilla Dorsey, the widow of the testator, refused to abide by the will. That they have received in payment for part of the personal estate sold by them, about the sum of 2,532*l.* 19*s.* 11*d.* in the late paper continental money, and also for debts due to the testator the sum of 230*l.* 7*s.* 7*d.* and have disposed of the said moneys by placing them on interest on loan to the United States and to this State. They state the Act of Assembly passed at November Session, 1773, ch. 11, authorizing the defendants, and others, the then executors of the said Caleb Dorsey, and other persons therein mentioned, to make sale of certain lands of the testator for the payment of legacies, reserving one-sixth part thereof to E. Dorsey, one of the defendants; that the lands were sold by the defendants, and others, before the female complainant's intermarriage with Scott the other complainant, to the \* amount of 2,462*l.* 13*s.* 3*d.* That a part of the land directed by the testator in his said will to be sold, **229** had been sold by him in his life-time, and that after his death, the executors received for such part the sum of 305*l.* 15*s.* 0*d.* in continental money. That a second sale of other lands was made in June, 1780, by the surviving trustees in the Act of Assembly mentioned, whereof the defendants were a part, to the amount of £7,160, the sixth part thereof belonged to E. Dorsey, one of the defendants, in his own right, and another sixth part belonged to S. Dorsey. That there was a bill filed in the Court of Chancery against the testator in his life-time, and now depending against his executors, by Ely Dorsey, claiming a large sum of money. That the amount of the personal estate and lands sold is not sufficient, independent of the claim of the said Ely Dorsey, to pay the several pecuniary legacies, had the whole of the proceeds of the sale of such lands and personal estate been in specie.

HANSON, C. On the petition of the complainants, directed the auditor to state an account of the personal estate, and of the money

arising from the sales of the real estate, which had come to the hands of the executors, and of the disposition thereof by them, and of the assets remaining in their hands.

The auditor, on the 22d of April, 1795, reported that he had stated an account, &c. whereby there appeared to be in the hands of the executors the sum of 19,213*l.* 18*s.* 9*d.* for the disposition of which by them, they had no document to shew, and that out of that sum they were entitled to a credit for the widow's one-third part, and also for the specific legacies; but that there was no evidence of the same having been paid or delivered by them.

The defendants made various exceptions to the auditor's report.

1. That they are not chargeable, as executors, with the balance of the real estate sold, amounting to \* 9,888*l.* 5*s.* 1*d.* because the **230** said real estate was sold in virtue of an Act of Assembly, by which it will appear that sundry other persons, besides the defendants, are accountable for such sales, and that it would be unjust to make the defendants solely chargeable with the amount of said real estate, when they have not received the same, and no evidence was laid before the auditor to make them chargeable therewith.

2. That the balance of 9,325*l.* 13*s.* 8*d.* stated to be in their hands, of the personal estate, hath been paid away, and the auditor refused to allow the defendants' proof of that fact, it being an account stated with the Orphans' Court.

3. The auditor has not reported the amount due on the claim of Ely Dorsey, depending against the defendants as executors in the Court of Chancery.

4. The auditor refused to give further time to the defendants to produce vouchers, &c.

HANSON, C. On the 16th of December, 1795, acted upon the exceptions, and disposed of them as follows, viz.

1. If it appears that the executors received the money arising from the sale of the real estate, they are certainly accountable for it in this suit. The Chancellor conceives it to have been the intent of the Act of Assembly; that the executors should dispose of the money, when raised, in discharge of legacies, which is a business properly belonging to executors; the Act however is not explicit, and it is possible that all the trustees might have taken upon themselves the disposal of the money, as well as the conduct of the sale. Whether they did or not, is a question concerning which no satisfaction is received from the answer of the defendants, which indeed might have been excepted to on that account. As matters are circumstanced, the Chancellor is of opinion, that if the complainants can show any instance in which the executors disposed of any part of the money arising from the sale without the concurrence of the other trustees, there arises a presumption, to be defeated **231** only by positive \* proof, that the executors received the whole

of the said money, and are therefore to account for it. The Chancellor can say nothing further on this exception, as the facts are not ascertained, than that the account should be referred back to the auditor, who shall receive evidence, and determine thereon according to the opinion here given.

2. This exception also relies upon an alleged fact, concerning which the Chancellor has no proof except an exhibit, which is an account stated with the Orphans' Court. He can only say, that if the fact be as stated, the money paid away by the defendants ought to be allowed. The auditor must examine the proofs. He is not however concluded by the allowance of the Orphans' Court, but must determine, from the vouchers produced, whether or not the articles stated in that account are just.

3. The suit mentioned in this exception is submitted to the Chancellor, and on examination thereof, which will soon take place, he will be able to decide better on the merits of this exception, and will instruct the auditor accordingly.

The auditor was directed to state another account, &c. And on the 10th of February, 1796, he again reported, that there was a balance of 12,692*l.* 11*s.* 8*d.* current money, due on the account against the executors, out of which they were entitled to a credit for the specific legacies paid by them, and for which receipts were exhibited, but he had no evidence before him to ascertain the amount of specific legacies bequeathed or paid. That he had rejected a number of accounts paid by the executors, as being improper, and unsupported by evidence, amounting to 783*l.* 10*s.* 3*d.*

The defendants made nineteen exceptions to this report, stating that various accounts had been rejected by the auditor, which ought to have been allowed, viz: accounts for money paid for necessities supplied to the family of the deceased for their support, within twelve months after his decease, and for money paid \* to a person to collect the debts; that other accounts had not been allowed at the times they were paid, and that more interest was charged than was proper. That no allowance for funeral expenses, and for finishing the crop, and for supporting the family, &c. had been made; nor any for the sum decreed in the suit brought by Ely Dorsey, nor any commission to the defendants for selling the lands; and that he had charged in specie, money received by them in continental currency. They also stated sundry other objections to the report. 232

HANSON, C. (2d of May, 1797.) The Chancellor having on submission considered the defendants' exceptions to the auditor's report, is of opinion as follows:

1. There is no foundation in law for this exception, it is therefore disallowed. [The claim set up in this exception was for an account

against the estate of the testator for articles furnished to the family for their support within twelve months after his decease.]

2, 3, 4, 5, 6. When the Chancellor in his order for stating the account, said that the auditor should not be concluded by the allowance of the Orphans' Court, his meaning was, that if the allowance were not authorized by law, that is to say, if the articles for which the allowance was claimed and made by the Court, were in their nature improper to be charged by an executor, the auditor should not therewith credit the defendants; the Chancellor did not mean that the auditor should require evidence to establish articles allowed by the Orphans' Court, provided the said articles were of a nature proper to be allowed. As all the articles mentioned in these exceptions have been allowed by the said Court, and were proper to be allowed, the exceptions are admitted.

7. It is the province of the Orphans' Court to determine, whether or not an allowance of an extra commission shall be made to an executor for extraordinary trouble. As it does not appear that the said Court \* have thought proper to allow a commission extraordinary, there is no just ground for this exception, and it is therefore disallowed.

8. The Chancellor will so decree in this cause respecting interest, that it will be immaterial at what period the accounts were paid; the defendants will be charged interest only from the time of filing the bill on the balance in their hands.

9. No vouchers appear to have been exhibited relative to finishing the crop. On what legal foundation an allowance for maintaining the family is craved, the Chancellor cannot perceive. As to funeral expenses, the law has limited a sum exceeding which the Orphans' Court, or the former commissary, could not go. There is no voucher concerning these expenses, and if there were, they ought to have been laid before the proper tribunal, whose allowance, not exceeding the limited sum, would be adopted here. The exception is disallowed.

10. Unquestionably the defendants ought to be credited with the amount of any fair judgment or decree against them. The exception is allowed. The complainants may either wait the result of the appeal, or hereafter have a just ground for another suit, in case the decree be reversed or changed in favor of the appellants.

11. The auditor had no authority to allow a commission on the sale of the lands, and it is certain the defendants have been allowed a full commission on the money arising from the sale. The exception is disallowed.

12. It is consonant to justice, that the defendants be charged as they received. It appears that they received 305*l.* 15*s.* 0*d.* paper money, in March, 1779, and the scale of depreciation ought to ascertain the value of it in current money.

13, &c. The defendants are entitled to an allowance for the widow's thirds, whether they have paid them or not, &c. The defendants are entitled to a credit for the full amount of the specific legacies as \* the said amount shall appear to the auditor, and the appraisement of the articles bequeathed ought to be taken as conclusive evidence, because the defendants are answerable, either for those articles, or their full value, whatever that may be. The charge for the maintenance and education of Edward Dorsey, son of the deceased, is proper, if the defendants can support it by proof. **234**

The auditor was directed to restate the account, &c. and on the 6th of June, 1797, the auditor again reported, by which it appears that there was due to the complainants the sum of 51*l.* 15*s.* 4*d.* exclusive of interest.

HANSON, C. on motion, ordered that the auditor's report be approved and confirmed, unless exceptions thereto be filed on the part of the complainants on or before the 4th day of the next term, provided a copy of this order be served on the complainants, or their solicitors, before the 10th instant.

HANSON, C. (15th January, 1799.) The auditor having returned his report with a statement agreeably to the decision of the Chancellor, on the exceptions taken to the former report, and no exceptions being filed against the last account and report—Decreed, that the report of the auditor be absolutely approved, ratified and confirmed.

In the Chancellor's decision on the exceptions, he intimated his intent of charging interest from the time of filing the bill, and under all circumstances he conceives it proper so to do. The principal sum stated by the auditor to be due to the complainants, is 51*l.* 15*s.* 4*d.* and the interest thereon to this day, from the 10th of December, 1789, the time of filing the bill, is 28*l.* 5*s.* 2*d.* and both together amount to the sum of 80*l.* 0*s.* 6*d.* Decreed, that the defendants do pay to the complainants the said sum of 80*l.* 0*s.* 6*d.* current money, and costs. From which decree the complainants appealed to this Court.

\* *Martin*, (Attorney-General,) *Key*, *Shaff* and *Scott*, for the appellants. **235**

*Ridgely* and *S. Johnson*, for the appellees.

The Court of Appeals, RUMSEY, Ch. J., POTTS and DENNIS, JJ. (MACKALL and JONES, JJ. did not attend) at an adjournment of this term, viz: the 13th of June, 1802, passed the following decree, to wit: After hearing counsel upon this appeal, it is adjudged, ordered and decreed, that the decree of the Chancellor be reversed, and that the appellants be allowed their costs of appeal.

It is further adjudged, ordered and decreed, that the appellees account with the appellants for the legacy bequeathed to the appellant's wife Elizabeth, with interest thereon from the 1st day of June, 1788, and that the appellees, the executors of Caleb Dorsey, be charged in said account with the amount of all sales of the testator's lands, by them made, and interest thereon, agreeably to the terms of sale, and that the executors, so far as they were possessed of assets, be not allowed interest on debts by them paid after the testator had been more than twelve months dead.

And it is further adjudged, ordered and decreed, that the Chancellor pass such decree and order as shall be necessary to have the account stated on the principles and in the manner herein directed, and on return thereof, if the assets in hand are adequate to the payment of the legacies charged thereon, that then the Chancellor pass a decree for the payment of the full legacy and interest due the appellants; and if the assets are inadequate, then to decree the amount of the legacy and interest to be paid so far as assets are stated to be in hand, and to bind future assets as they come to hand, with costs of suit to be allowed the complainants.

## 236 \* GENERAL COURT, (E. S.) APRIL TERM, 1802.

### WHITTINGTON *vs.* POLK.

An Act of Assembly repugnant to the Constitution is void.

The Court have a right to determine an Act of Assembly void, which is repugnant to the Constitution. (a)

The Act of Nov. Session, 1801, ch. 74, relating to the administration of justice, &c. is not unconstitutional.

The Justices of the County Court under that Act, were not entitled to commissions during good behavior.

That Act being limited to a certain number of years, and creating a judicial office without limitation as to time, it was held that the incumbent of the office had a vested right to hold it for the term of years originally limited for the continuance of the law, but that Act could at any time be constitutionally repealed, although the repealing Act, depriving the incumbent of his office would be unjust.

The writ of assize of novel disseisin does not lie to recover the office of Chief Justice of a district.

ASSIZE of novel disseisin. The plaintiff prosecuted out of the General Court for the Eastern Shore, the following writ, to wit: "Maryland, *scd.* The State of Maryland to the Sheriff of Somerset County, Greeting. William Whittington, of Worcester County, gentleman, complains, that William Polk, of Somerset County, gentleman, unjustly, and without judgment, hath disseised him of his free-

(a) Affirmed in *Regent vs. Williams*, 9 G. & J. 410.



hold in his office of Chief Justice of the County Courts of the Counties of Caroline, Dorchester, Somerset and Worcester, in the fourth district of the State aforesaid, with its appurtenances, at Worcester County aforesaid in the said State, within thirty years now last past, as he saith, and so forth. Therefore you are hereby commanded. that if the said William Whittington shall make you secure in prosecuting his claim, then put by gages and safe pledges the said William Polk, that he be and appear before the General Court to be held for the Eastern Shore of this State at Easton, in Talbot County, on the second Tuesday of April next, then and there to answer the complaint aforesaid; and have you then and there the names of the pledges, and this writ, and so forth. Witness the honorable JEREMIAH TOWNLEY CHASE, Chief Judge of the said Court, the eighth day of September in the year of our Lord one thousand eight hundred and one.

Issued the 24th of March, 1802.

(L. MARTIN.)

JAMES EARLE, Junr. Clk."

*Sheriff's return.*—"Maryland, Somerset County, to wit: The within named William Polk is attached by pledges, with notice of trial at the next term, on the 7th day of April, 1802.

Pledges to prosecute, John Doe, Richard Roe.

So answers JNO. WILKINS, Shff."

*Declaration.*—"Eastern Shore of Maryland, Somerset County, *scilicet*. William Polk, of Somerset County, \* gentleman, was attached to answer the complaint of William Whittington, of Worcester County, gentleman, for that unjustly, and without judgment, he the said William Polk disseised him the said William Whittington of his freehold in his office of Chief Justice of the County Courts of the Counties of Caroline, Dorchester, Somerset and Worcester, in the fourth district of the State aforesaid, with its appurtenances, at Worcester County aforesaid, in the said State, within thirty years now last past, as he saith, and so forth. And whereupon the said W. W. by Luther Martin, his attorney, complains, that the said W. P. disseised him the said W. W. of his freehold in his office of Chief Justice of the County Courts of the Counties of Caroline, Dorchester, Somerset and Worcester, in the fourth district of this State, with its appurtenances. And for his title to the said office, and its appurtenances, the said W. W. saith, that by the Constitution or form of government of this State, among other things it is provided and established, that the Governor for the time being, with the advice and consent of the Council, may appoint all Judges; and that all Judges shall hold their office during good behavior, removable only for misbehavior, on conviction in a Court of law. And that by a certain Act of the General Assembly of Maryland, made and passed at a session of the General Assembly, begun and held at the City of Annapolis, on Monday, the seventh day of November, and ended the thirty-first day of December, in the year of our Lord

one thousand seven hundred and ninety-six, entitled, "An Act for the better administration of justice in the several counties of this State," it was among other things enacted, that this State shall be divided into five districts, to be numbered and distinguished as follows: that is to say, Saint Mary's, Charles, Prince George's and Calvert Counties, should be the first district; Cecil, Kent, Queen Anne's, and Talbot Counties, should be the second district; Anne Arundel, Baltimore and Harford Counties, should be the third district; Caroline, Dorchester, Somerset, and Worcester Counties, should be

**238** \* the fourth district; and Washington, Frederick, Montgomery, and Allegany Counties, should be the fifth district; and that the County Courts in each district should be composed of the Chief Justice of the district in which each county should be, and of two Associate Justices appointed for such counties respectively. And the said W. W. further saith, that by a certain other Act of the General Assembly of Maryland, made and passed at a session of the General Assembly begun and held at the City of Annapolis, on Monday, the sixth day of November, in the year of our Lord one thousand seven hundred and ninety-seven, and ended the twenty-first day of January in the year of our Lord one thousand seven hundred and ninety-eight, entitled, "A supplement to the Act for the better administration of justice in the several counties of this State," it was among other things enacted, that upon the death, resignation, removal out of the district, or other disqualification of any Chief Justice then in commission, or who might thereafter be commissioned by virtue of the said Act, the Governor and Council should be authorized and directed to appoint and commission for such district in which the vacancy might happen, one person of integrity, experience, and sound legal knowledge, who after his appointment should reside in the district for which he should be appointed, (and who should be styled in the commission Chief Justice of the County Courts in such district,) and that the said Chief Justice should hold his commission during good behavior, and might be removed for misbehavior, in the same manner as the Chancellor and the Judges might be removed, agreeably to the Constitution of this State, and not otherwise. And that it was further enacted by the Act last mentioned, that every Chief Justice who might be thereafter appointed in virtue of the said Act for the fourth district, should receive as a compensation for his services, at the rate of one thousand three hundred dollars per annum. And the said W. W. further saith, that agreeably to the Constitution of this State, and

**239** according to the provisions and directions \* of the two Acts of Assembly in part above recited, on the 28th day of February, 1799, the Governor of this State, with the advice and consent of the Council, did duly appoint and commission, according to the directions of the Constitution and laws of this State, the aforesaid W. W. to the office of Chief Justice of the County Courts of the

Counties of Caroline, Dorchester, Somerset and Worcester, in the fourth district of the State aforesaid, (which office was then vacant,) and to hold his said office during his good behavior, &c. And which said commission the said W. W. brings into Court, the date whereof is the same day and year aforesaid. And the said W. W. further saith, that he did accept the said commission and office, and that afterwards, on the 12th day of March, 1799, he the said W. W. took the several oaths required by the Constitution of the United States, and by the Constitution, and Acts of the General Assembly, of this State, and subscribed a declaration of his belief in the Christian religion, before he acted in his said office of Judge. And the said W. W. saith that he took and received the salary and profits of the said office from the date of his commission aforesaid, until the 20th day of January last; and at the time of his being appointed and commissioned he was, and ever since he hath been, and at this time he is, a person of integrity, experience, and sound legal knowledge, and fit and sufficient to execute the said office; and that at the time of his being appointed and commissioned as aforesaid, and long before and ever since, he hath been, and at this time is a resident of the said fourth district; and that he was seized of, held, exercised and enjoyed, the said office, and discharged the duties thereof, and behaved himself well therein from the said 12th day of March, 1799, until the 8th day of February, 1802, when the aforesaid W. P. at Worcester County aforesaid, unjustly, and without judgment, disseised him the said W. W. of his freehold in his aforesaid office, with its appurtenances, and so forth; and this he is ready to verify; and thereof he bringeth suit, and so forth.

\* *Luther Martin*, Att'y for plaintiff.

{ *John Doe* and

Pledges to prosecute

{ *Richard Roe*." 240

*Plen.*—"And the said William Polk, by Josiah Bayly, his attorney, comes and defends the force and injury when, &c. and whatever, &c. and saith, that the said W. W. never was seized of the office aforesaid of such estate, whereof he the said W. W. could be disseised; and if, &c. then the said W. P. saith, that he hath done no injury nor disseisin of the office aforesaid to him the said W. W. in such manner and form as the said W. W. above against him hath declared, and so forth; and of this he puts himself upon the assize, &c. And the said W. W. likewise, &c."

*Special Verdict.*—"And the jurors aforesaid, upon their oath aforesaid, do say, that under and pursuant to the directions of the Act of the General Assembly of this State, passed at November Session, 1796, entitled, "An Act for the better administration of justice in the several counties of this State," and under and by virtue of the several Acts of Assembly for continuing and amending the same and supplementary thereto, a commission from the Governor and Council of this State, under the Great Seal thereof, and in due form of law, did issue to the plaintiff, bearing date on the 28th day of

February, 1799, which commission is in the following words: [The commission here follows.] And that the plaintiff did accept the said commission, and did duly qualify under the same, and did enter into the discharge of the duties of the said office, and continued to discharge them in a proper and sufficient manner, until the 20th day of January now last past, and received the salary annexed by law to the said office. And they further find, that the plaintiff, at the time of the date of the said commission, and at all times since, did reside, and still doth reside within the fourth district aforesaid, in the said commission mentioned; and hath not in any manner resigned or forfeited the said commission. And they further find, that under and pursuant to the directions of the Act of the General

**241** Assembly of this State, passed at November \* Session, 1801, entitled, "An Act relative to the administration of justice in this State, and to repeal the Acts of Assembly therein mentioned," a commission in due form of law, from the Governor and Council of this State, under the Great Seal thereof, did issue to the defendant, which commission bears date on the 28th day of January, 1802, and is in the following words: [The commission here follows.] And that the defendant did accept the said commission, and did duly qualify under the same, and did enter into the discharge of the duties of the said office, and hath continued until the present time to discharge the same in a proper and sufficient manner, and still continues to hold the said office, and discharge the said duties, without having in any manner resigned or forfeited the said office. And they further find, that at the time of the date of the last mentioned commission, and ever since, the defendant hath resided, and still doth reside within the said fourth district in the said commissions mentioned; and that both the plaintiff and defendant are persons of integrity, experience and sound legal knowledge. But whether upon the whole," &c. &c.

"JNO. EDMONDSON, Foreman."

*Martin*, (Attorney-General,) and *Harper*, for the plaintiff.

*Bullitt*, *Scott* and *Bayly*, for the defendant.

This case was argued before CHASE, Chief Judge, DUVALL and DONE, Judges—and they took time to form their opinion till June following, when the following opinion in writing, signed by all the Judges, was delivered by

CHASE, Ch. J.—In the discussion of this case the following points were raised and contended for by the counsel of the plaintiff.

1st. That an Act of Assembly repugnant to the Constitution is void.

2d. That the Court have a right to determine an Act of Assembly void, which is repugnant to the Constitution.

**242** \* 3d. That the Act of Assembly passed in 1801, ch. 74, entitled, "An Act relative to the administration of justice in

this State, and to repeal the Acts of Assembly therein mentioned," so far as respects the plaintiff, is unconstitutional and void.

4th. That the Assize of Novel Disseisin is the proper remedy to recover the office of Chief Justice of the fourth district.

The two first points were conceded by the counsel for the defendant; indeed they have not been controverted in any of the cases which have been brought before this Court.

Notwithstanding these concessions, the Court deem it necessary to communicate the reasons and grounds of their opinion on those points.

The Bill of Rights and form of government compose the Constitution of Maryland, and is a compact made by the people of Maryland among themselves, through the agency of a convention selected and appointed for that important purpose. This compact is founded on the principle that the people being the source of power, all government of right originates from them. In this compact the people have distributed the powers of government in such manner as they thought would best conduce to the promotion of the general happiness; and for the attainment of that all-important object have, among other provisions, judiciously deposited the legislative, judicial and executive, in separate and distinct hands, subjecting the functionaries of these powers to such limitations and restrictions as they thought fit to prescribe. The Legislature, being the creature of the Constitution, and acting within a circumscribed sphere, is not omnipotent, and cannot rightfully exercise any power, but that which is derived from that instrument.

The Constitution having set certain limits or land-marks to the power of the Legislature, whenever they exceed them they act without authority, and such acts are mere nullities, not being done in pursuance of power delegated them: Hence the necessity of  
 \* some power under the Constitution to restrict the Acts of **243**  
 the Legislature within the limits defined by the Constitution.

The power of determining finally on the validity of the acts of the Legislature cannot reside with the Legislature, because such power would defeat and render nugatory, all the limitations and restrictions on the authority of the Legislature, contained in the Bill of Rights and form of government, and they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the Constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other.

This power cannot be exercised by the people at large, or in their collective capacity, because they cannot interfere according to their own compact, unless by elections, and in such manner as the Constitution has prescribed, and because there is no other mode ascertained by which they can express their will. It is true the people may assume the powers of government whenever the ends of it are

perverted, when public liberty is manifestly endangered, and all other means of redress are ineffectual; but surely every act of the Legislature repugnant to, or in violation of the Constitution, cannot be held a sufficient cause for the interposition of the people in a way which subverts the government and reduces the people to a state of nature, and therefore cannot be the proper mode of redress to remedy the evils resulting from an Act passed in violation of the Constitution.

The interference of the people by elections cannot be considered as the proper and only check and a suitable remedy, because in the interval of time, between the elections of the members who compose the different Legislatures, the law may have had its full operation, and the evil arising from it become irremediable; nor is it probable that the elections will be made with the view to afford redress in such particular \* case, and if they were, and the law should be  
**244** repealed, it would not be an adequate remedy.

The Senate of Maryland, one of the component parts of the Legislature, is elected for five years, and vacancies in that body, occasioned by death, resignation, or removal out of the State, are filled up by their own appointment. The present Senate was elected in the month of September, 1801, and the law under which the plaintiff claims the office of Chief Justice of the fourth district is a temporary law, and would have expired before the termination of the five years for which the present Senate is elected, which shews in this instance that the interference of the people in their election is not the proper mode of redress for an injury sustained by an Act passed in violation of the Constitution.

It is the office and province of the Court to decide all questions of law which are judicially brought before them, according to the established mode of proceeding, and to determine whether an Act of the Legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the Constitution in the Legislature; for if it is not the result or emanation of authority derived from the Constitution, it is not law, and cannot influence the judgment of the Court in the decision of the question before them.

The oath of a Judge is "that he will do equal right and justice according to the law of this State, in every case in which he shall act as Judge." To do right and justice according to law, the Judge must determine what the law is, which necessarily involves in it the right of examining the Constitution, (which is the supreme or paramount law, and under which the Legislature derive the only authority they are invested with, of making laws,) and considering whether the Act passed is made pursuant to the Constitution, and that trust and authority which is delegated thereby to the legislative body.

The three great powers or departments of government are independent of each other, and the Legislature, \* as such, can claim  
**245** no superiority or pre-eminence over the other two. The Legisla-

ture are the trustees of the people, and, as such, can only move within those lines which the Constitution has defined as the boundaries of their authority, and if they should incautiously, or unadvisedly transcend those limits, the Constitution has placed the judiciary as the barrier or safe-guard to resist the oppression, and redress the injuries which might accrue from such inadvertent, or unintentional infringements of the Constitution.

This power is properly vested in the judiciary, because to secure their uprightness and independency, the Constitution declares they shall hold their commissions during good behavior, and shall receive liberal salaries as a compensation for their services, and because they are appointed by the executive, who, it is to be presumed, will appoint those persons Judges, who are most distinguished for their integrity, experience, and reputation for legal knowledge; such men, from the nature of their studies and avocations in life, may be presumed, without disparagement to the talents and legal acquirements of others, better qualified, and more competent than the rest of the community, to the decision of legal and constitutional questions.

It is true this presumption, like many others, may fail in some instances; but that by no means proves the fallacy of the reasoning, or evinces the impropriety of lodging the power with the judiciary. To secure an honest decision, and to prevent the mischiefs, which would flow from partiality or corruption, the Judges are liable to be removed from office, on conviction of misbehavior, in a Court of law.

It is also observable, that the Courts cannot take judicial cognizance of any Act repugnant to the Constitution, unless the question is judicially brought before them, and then it is fully discussed by counsel learned in law, and the Court decide on mature consideration.

\* Under these safe-guards nothing can be wanting to inspire a well grounded confidence in the people, that the judiciary will honestly and rightly determine all questions which are brought before them, arising under the Constitution, and the laws of the State made pursuant thereto. **246**

As to the third point. That the Act of Assembly passed in 1801, ch. 74, entitled, "An Act relative to the administration of justice in this State, and to repeal the Acts of Assembly therein mentioned," so far as respects the plaintiff, is unconstitutional and void.

The Court cannot help regretting that any occurrence should render it necessary to resort to the judiciary to decide the question, whether an Act of the General Assembly is constitutional or not? But whenever it does become necessary, and the case is judicially brought before this Court, they trust they will not seek any evasion, or shrink from the determination of it, but act with caution and circumspection, and give it that consideration which the importance of it, and their duty, demand.

The motives which may induce the Legislature to pass a law cannot be inquired into by the Court in a question as to its constitution-

ality; nor can the policy or inexpediency of the law have any influence with them in deciding such question. The only inquiry with the Court is, whether the Act passed is made pursuant to the power vested in the General Assembly by the Constitution. Although, in the opinion of the Court, the authority of the General Assembly is limited, yet as the powers of legislation are not particularly or specifically defined, but conferred under a general grant, they are subject only to such restrictions and limitations as are prescribed by the Bill of Rights and form of government, and the Constitution of the United States.

The parts of the Constitution most applicable to the question, and which have been very amply animadverted on by the counsel, are the following articles of the form of government:

**247** \* The 40th.—That the Chancellor, all Judges, the Attorney General, clerks of the General Court, the clerks of the County Courts, &c. shall hold their commissions during good behavior.

The 49th.—That all civil officers of the appointment of the Governor and Council, who do not hold commissions during good behavior, shall be appointed annually in the third week of November.

The 47th.—That the Judges of the General Court, and Justices of the County Courts, may appoint the clerks of their respective Courts.

The 50th.—That the Governor, every member of the Council, every Judge and Justice, before they act as such, shall respectively take an oath, "that he will not, through favor, affection or partiality, vote for any person to office, &c.

The 56th.—That there be a Court of Appeals, &c.

The 44th.—That a justice of the peace may be eligible as a senator, delegate, or a member of the Council, and may continue to act as a justice of the peace.

And the following articles of the Bill of Rights.

The 6th.—That the legislative, executive, and judicial powers of government, ought to be for ever separate and distinct from each other.

The 30th.—That the independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore the Chancellor and all Judges ought to hold commissions during good behavior.

In the report of the committee it stood, "wherefore the Chancellor, all Judges and justices," &c. but it does not appear by the printed proceedings of the convention how the word justices came to be omitted.

The judiciary of Maryland, previous to the time when the Constitution of Maryland was formed, consisted of County Courts, a Provincial, now General Court, a Court of Appeals, Chancery Court, and Court of Admiralty.



\* The justices of the peace in their respective counties were conservators of the peace, and individually or singly had a limited jurisdiction conferred by Acts of Assembly, and in their respective counties they composed the County Courts, but for holding Court one of the quorum must have been present, *i. e.* one of certain justices named in the commission. **248**

By an Act of the General Assembly which passed at the first Session of Assembly, (in February, 1777,) which was held after the formation of the government, the forms of the commissions were prescribed. The Judges of the Court of Appeals, General Court and Court of Admiralty, were to hold their commissions during good behavior; the Justices of the County Courts until they should be duly discharged.

The Justices of the County Courts have been annually appointed by the Governor and Council. This has been the uniform and uninterrupted practice ever since the Constitution was established until the modification of the system in the year 1790.

By the 48th Article of the form of government, the Governor, with the advice and consent of the Council, may suspend or remove any civil officer who has not a commission during good behavior.

It appears to the Court, upon considering the several parts of the Constitution which relate to the question, to be the plain and obvious meaning of that instrument, that the Justices of the County Courts were not entitled to commissions during good behavior.

A plain distinction is kept up between the Justices of the County Courts and the Judges of the other Courts, and a studied uniformity of language has been observed throughout to preserve the distinction.

So far as respects the Justices of the County Courts, the principle in the Bill of Rights, that the legislative, executive and judiciary, shall for ever be kept separate and distinct, is departed from, and they are made capable of being elected members of the General Assembly, or members of the Council; which constitutes a very striking distinction between the Justices of the County Courts, and the Judges of the other Courts, and \* manifests plainly that it was not the intention to place them on the same footing as **249** to the durability of their commissions.

The word justices, which was inserted in the report of the committee, being omitted in the Bill of Rights, is a circumstance which, with the Act of Assembly directing the forms of the commissions, operates forcibly on our minds to confirm our opinion.

The General Assembly possess competent authority to modify the County Courts in such manner as they may think will conduce to the better administration of justice, and this power has been exercised.

The power and authority of the plaintiff as Chief Justice of the fourth district, and his right to the office of Chief Justice, are created by, and derived from the Legislature, and the duration of his com-

mission is limited by Act of Assembly. Upon his appointment by the executive, his acceptance of the commission, and qualifying under the same, a right vested in him to hold the office for the term of years limited for the continuance of the law; which right was not to cease or determine but on his death, or on his being convicted, in a Court of law, of misbehavior.

Although, in the opinion of the Court, the said repealing Act, in depriving the plaintiff of his said office, is an infraction of his right, and incompatible with the principles of justice, and does not accord with sound legislation; yet the said office, and the right to hold it, being created by Act of Assembly, and not vested in the plaintiff by the Constitution, and there being no clause or article in the Bill of Rights or form of government prohibiting or restricting the Legislature in passing the said repealing Act, the Court are of opinion that the said Act is not void.

The Court are also of opinion, that the writ of assize of novel disseisin does not lie in this case to recover the said office, because the plaintiff has only an interest for a term of years in the said office, determinable on the contingency of his being convicted of misbehavior in a Court of law; and that writ is not adapted to the recovery of

any estate or interest in \* lands, or in an office less than a  
**250** freehold, except in the case of a tenant by *elegit*, who has a chattel interest, or an interest less than freehold, having a right to hold a moiety of the lands of the debtor, until the debt is satisfied by holding the land and perception of the profits, at the extended value.

The remedy by writ of assize of novel disseisin was given to the tenant by *elegit*, by the Statute of 13 Edw. I, c. 18, to recover the possession of the land in case he was ousted before his debt was satisfied, and this remedy has been extended in England to the tenant by statute merchant, and statute staple, by equity of the said statute, for the similitude of their estates to that of tenant by *elegit*. But the Court know of no other case in which that remedy has been allowed to recover an interest less than a freehold; and are of opinion, that the writ of assize of novel disseisin cannot be extended to this case by equity of the said statute, there being no similarity between the estate of tenant by *elegit*, and the interest which the plaintiff has in the office of Chief Justice of the fourth district; and besides, the Court know of no instance, in this State, in which the tenant by *elegit* has brought the writ of assize of novel disseisin to recover his possession, and none of the English statutes which passed anterior to the first emigration of the inhabitants of Maryland, have been adopted by the Constitution of Maryland, and incorporated with the laws, but such as have been found by experience to be applicable to our local and other circumstances. And it does not appear to the Court there can be any other safe criterion by which the applicability of such statutes to our local and other

circumstances can be ascertained and established, but that of having been used and practised under in this State.

For these reasons the Court are of opinion, that the writ of assize of novel disseisin cannot be sustained in this case; and order judgment of *non pros.* to be entered.

\* DUVAL, J. Dissented to that paragraph in the reasoning, which states the right of the plaintiff to the office to be 251 during the continuance of the Act under which he was commissioned, and that the Act of 1801, was an infraction of his right, &c. as will appear by the following letter:

ANNAPOLIS, 12th June, 1802.

SIR:—To-morrow Col. Done will leave this place, and on his return home, will deposit with you the opinion of the Judges in the case of *Whittington* against *Polk*.

I concurred in the opinion given on each of the points made in the cause: that is to say,

1. That an Act of the Legislature contrary to the Constitution is void.

2. That the Courts of judicature have a power to declare it void.

3. That the Act of 1801 relating to the judiciary is not void.

4. That the writ of assize of novel disseisin for the office of Chief Justice of the fourth district cannot be sustained.

Thus concurring, the opinions and reasoning have my signature: but I declared my dissent at the time, to that paragraph, in the reasoning, which states the right of Mr. Whittington to the office, to be during the continuance of the Act under which he was commissioned, and that the Act of 1801, was an infraction of his right, &c.

I consider the observations in this paragraph as partly erroneous, and partly extra-judicial.

It would have been more proper to have noted the exceptions in writing, at the time of signing, but that having been omitted, let this letter remain among your files as a memorial that my assent was not given to the paragraph alluded to.

I am, Sir, respectfully,

Your obedient servant, G. DUVAL.

JAMES EARLE, Esq. Clerk of the General Court, Eastern Shore.

**252 \* GENERAL COURT, (E. S.) APRIL TERM, 1802.**

DIXON, use of BERRY vs. SWIGGETT.

Parol evidence cannot be given to prove the non-payment of the consideration money for lands sold and conveyed, the deed expressing that the consideration had been received. (a)

THIS was an action of general *indebitatus assumpsit*, with also a count for a *quantum valebat*, for money, the consideration for certain lands in Caroline County sold and conveyed by the plaintiff to the defendant.

*Hammond* and *J. Bayly*, for the plaintiff, in support of their case, offered parol testimony to prove that the full consideration money had never been paid. They admitted the execution of the deed of bargain and sale conveying the land, and voluntarily exhibited a copy of it, wherein, according to the usual form, the full consideration money was acknowledged to have been received; and on the back, between the execution and the acknowledgment of the deed before the magistrates, a receipt of the consideration money was indorsed and signed by the bargainor, as usual; but they contended that the receipt in full within the body of the deed, as well as the indorsement of the same on the back, were mere formalities, and as such could not prevent them from shewing that the consideration money was in reality still due. They admitted that it placed the burthen of proof of non-payment on them, but it was not conclusive against them.

*Martin*, (Attorney-General,) and *Bullitt*, for the defendant, objected to the plaintiff's giving such parol testimony.

THE COURT were of opinion that the plaintiff in this case could not give any parol testimony to prove the non-payment of the consideration money, contrary to his express acknowledgment of it on the face of the deed.

The plaintiff non-suited.

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(a) This decision, being inconsistent with the cases of *Wolfe vs. Hauver*, 1 G. 89; *Lingan vs. Henderson*, 1 Bl. 249; *Higdon vs. Thomas*, 1 H. & G. 145; *Elysville Co. vs. Okisko Co.* 1 Md. Ch. D. 395; *Bladen vs. Wells*, 30 Md. 578; *O'Neale vs. Lodge*, 3 H. & McH. 250, may be regarded as overruled. These cases establish the rule that the receipt in a deed for the purchase money is only *prima facie* evidence, and may be disproved by parol.

• GENERAL COURT, (E. S.) APRIL TERM, 1802. **253**RICHARDSON'S Lessee *vs.* PARSONS.

A verdict in a former suit where the judgment was reversed for error in fact, is not evidence in a trial on a new ejectment.

EJECTMENT for Richardson's Discovery and Conclusion, lying in Worcester County.

The counsel for the defendant objected to the verdict in a former suit being evidence, because the judgment was reversed for error in fact, the defendant having died before the verdict was taken; and they cited 1 *Str.* 162; 1 *Morgan's Essays*, 94; *Gilb.* 63; *Shower's Parl. Cases*.

CHASE, Ch. J. The Court are of opinion that the verdict cannot be received as evidence, inasmuch as the judgment was reversed for error in fact, the defendant being dead at the time and two days before the verdict was given. The judgment being reversed on that ground, there was no legal trial or verdict in the case.

*Hammond* and *Bullitt*, for the plaintiff.

*Martin*, (Attorney-General,) and *Harper*, for the defendant.

## GENERAL COURT, (E. S.) APRIL TERM, 1802.

GIBSON'S Lessee *vs.* SMITH.

Where a grant of a tract of land described it as lying on the E. side of Chesapeake Bay. and on the S. side of a river in the said bay called St. Michael's River, next adjoining the land of H. M. beginning at the said H. M.'s northermost bounded oak, running N. E. and by N. up the river for breadth 175 perches, to a marked pine by a marsh, bounding on the E. by a line drawn S. and by E. from the said pine for length 320 perches, on the S. by a line drawn S. W. and by S. for breadth from the end of the S. and by E. line, until it intersect a parallel drawn from the land of H. M. on the W. with said land and parallel, on the N. with said river, containing, &c. Held, that the said tract be located from its beginning to the place where the second boulder thereof stood, and from such place, according to the course and distance expressed in the grant, running 320 perches to the end of the second line, according to such course, and distance, and from thence, according to the course and distance expressed in the grant for the third line, to the place where the third line shall intersect with a parallel drawn from H. M.'s land, and from thence, according to the grant, to the beginning, (the jury finding from the evidence the places where the second boulder stood, and where the third line intersected with the parallel,) although such location runs the tract across the land of H. M.

A record in an action of trespass *q. c. f.* between parties under whom the plaintiff and defendant in ejectment claim, read in evidence, &c.

A land commission defectively executed, may be read in evidence to prove the commission had issued, but for no other purpose.

EJECTMENT for a tract of land called Robert and Margaret, lying in Talbot County. Defence on warrant and plots returned.

**254** \* 1. The plaintiff at the trial offered in evidence to the jury the patent of the tract of land called Robert and Margaret, surveyed on the 16th of May, 1763, for and granted to Robert Newcomb on the 18th of June, 1766, in virtue of an escheat warrant on a tract of land called Harbor Rouse; also the will of the said Newcomb, dated the 9th of March, 1790, devising that part of the said tract of land for which this ejectment is brought to his grandson, James Newcomb; also a deed of conveyance for the said land from the said James Newcomb to the lessor of the plaintiff, dated the 10th of December, 1793; also the location of the said land on the plots returned in this cause; also the certificate and patent of a tract of land called Harbor Rouse, surveyed for Anthony Griffin on the 26th of July, 1659, and granted to him on the 13th of February, 1659, and the location thereof on the plots by the plaintiff.

The defendant offered in evidence the certificate and patent of a tract of land called Harryton, surveyed on the 26th of July, 1659, for and granted to Henry Morgan on the 13th of February, 1659, "lying on the E. side of Chesapeake Bay, and on the E. side of a river in the said bay called St. Michael's River, beginning at the northermost bounded tree of Anthony Griffin's land, running N. N. E. up the river for the breadth of 150 perches to a marked oak at the mouth of a creek called Kirke's Creek, bounding on the N. by a line drawn E. up the creek for length 320 perches, on the E. by a line drawn S. S. W. from the end of the E. line until it intersect a parallel drawn from the land of Anthony Griffin, on the S. with the said land, on the W. with the said river, containing 270 acres." The defendant also offered in evidence the certificate and patent of a tract of land called Kirkham, surveyed on the 28th of July, 1659, for and granted to Michael Kirke and John Hill, on the 7th of January, 1659, "lying on the E. side of Chesapeake Bay, and on the S. side of a river in the said bay called St. Michael's

**255** River, next adjoining the land of Henry Morgan, beginning at the aforesaid \* Morgan's northermost bounded oak, running N. E. and by N. up the river, for breadth 175 perches, to a marked pine by a marsh, bounding on the E. by a line drawn S. and by E. from the said pine for length 320 perches, on the S. by a line drawn S. W. and by S. for breadth from the end of the S. and by E. line, until it intersect a parallel drawn from the land of Henry Morgan, on the W. with said land and parallel, on the N. with the said river, containing 350 acres." The defendant also offered in

evidence the locations of the two last-mentioned tracts of lands, as laid down by him on the plots as his defence.

Whereupon the plaintiff prayed the opinion of the Court, and their direction to the jury, that the said tract of land called Kirkham, according to its true location, and according to the true construction of the certificate and patent thereof, could not be laid down so as to run across the said tract of land called Harryton, but must be laid entirely to the northward thereof and adjoining thereto.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurred.) The Court are of opinion that the direction as prayed by the plaintiff ought not to be given. But the Court are of opinion, and so direct the jury, that the tract of land called Kirkham ought, according to the true construction of the certificate and patent thereof, to be located and laid down from its first beginning to the place where the jury shall be of opinion, from the evidence to be produced to them, the second boulder thereof stood, and from such place according to the course and distance expressed in the certificate and patent, running 320 perches to the end of the second line, according to such course and distance, and from thence according to the course expressed in the certificate and patent for the third line of the tract to the place where the third line shall, in the opinion of the jury from the evidence to be offered to them, intersect with a parallel drawn from the tract of land called Harryton, and from thence, according \* to the certificate and patent, to the beginning of the tract called **256** Kirkham. The plaintiff excepted.

2. The defendant, to prove the second boundary of the tract of land called Kirkham, as located by him on the plots, offered in evidence the record of a suit which had been brought in the late Provincial Court by Robert Newcomb against Jacob Hindman, under whom the defendant claims; by which record it appeared that an action of *trespass q. c. f.* had been instituted, for a trespass committed on the tract of land called Robert and Margaret; that the defendant in the said action pleaded *non cul* and *liberum tenementum* of a tract of land called Kirkham; that a warrant of resurvey issued, and plots with the depositions of sundry witnesses were returned; and that a trial was had at April Term, 1760, when the defendant obtained verdicts and judgment. The defendant also offered in evidence that the plaintiff derives his title to the land for which this ejectment was brought and claims under the said Robert Newcomb. The defendant further offered in evidence, to establish the said second boundary, the testimony of witnesses, who swore they had been shewn the same by a certain Francis Morling, who lived and had been brought up about 300 yards from the place, as the second boundary of Kirkham, and that he then declared he had received his information from James Condon and one Winchester. The defendant then produced and offered to read in evidence a record of a com-

mission, issued at the instance of the said Jacob Hindman, to commissioners, to take depositions respecting the boundaries of the said land called Kirkham, together with the return thereof, and the manner the commissioners had executed the same, except the depositions taken, which the defendant did not offer to give in evidence. The record of the commission and return states that "on the 13th of March, 1744, his Lordship's commission for the examination of evidences concerning their knowledge of the bounds of part of two tracts of land called Kirkham and Harrington," &c. "was issued \* directed to James Edge, &c. which commission is set forth ; and that William Thomas, &c. two of the said commissioners, made return of the said commission to the County Court held in November, 1747, certifying as follows, viz: "To the worshipful the Justices of Talbot County: These are humbly to certify your worships that, pursuant to your directions in the annexed commission to us given, we gave public notice of our meeting on the lands called Kirkham and Harrington, to examine evidence relating to the bounds, &c. according to an Act of Assembly in this case lately made and provided; that on the 2d day of November, 1745, we met on the said lands; that at the same time and place Perry Benson, John Lockerman and James Condon were the only evidences to us produced whose depositions are hereunto annexed. We further certify that a locust post, put down to ascertain the place where James Condon proves the second tree of Kirkham to have stood, stands four perches east from the said place. In testimony whereof?" &c. signed and sealed by the said two commissioners on the 12th of November, 1747. There was indorsed on the said commission a certificate of the said two commissioners having been "duly qualified according to law" on the 21st of June, 1745, before a justice of the peace. The defendant proposed to offer the said commission and return in evidence to the jury, only to prove that such commission had issued and been executed in some manner, and returned by the commissioners and recorded, and that there were at that time such persons living who were named James Condon, John Lockerman and Perry Benson, and that they had been examined on that commission, without proposing to read to the jury their depositions as returned with the said commission.

CHASE, Ch. J. The Court are of opinion, that the defendant may read in evidence the record of the commission itself, merely to prove such commission had been issued, but that no other part of the record shall \* be read, not even to prove that it had been executed in any manner whatever, or that it had been returned, or that James Condon, John Lockerman or Perry Benson, or either of them, had been sworn or examined on the said commission, or that such men, or either of them, were then living, or had ever lived.



3. The defendant did then read in evidence to the jury so much of the said record as contained the commission itself. And afterwards immediately offered to read to the jury the depositions in the said record contained, and certified by the said commissioners in their return to the said commission, to have been taken by and sworn to before them on the execution of the said commission—to which the plaintiff objected, because it did not appear by the said return, that the commissioners had given the notice required by law, in order to entitle the said depositions to be read.

CHASE, Ch. J. The Court refuse to let the said depositions be read in evidence, and they instruct the jury, that the said record and the said application made to the Court for liberty to read the said depositions, and their refusal to have them read ought not to be by them considered as evidence that the said commission had been executed in any manner, or had been by the commissioners returned, or that even the depositions of the said Condon, Lockerman or Benson, or either of them, had been taken before them on the said commission, or that they, or either of them, were then living or had ever lived.

4. The plaintiff gave evidence, that there was one James Condon who was supposed to be about the age of Francis Baker, who was born in 1738.

Whereupon the defendant, as a further reason, prayed he might give the said record in evidence to shew that James Condon last mentioned was not the James Condon examined by the said commissioners.

CHASE, Ch. J. The Court are of opinion that the said record shall not be given in evidence even for that purpose. The defendant excepted.

\* *Harper* and *J. Bayly*, for the plaintiff.

*Martin*, (Attorney-General,) and *Bullitt*, for the defendant. **259**

Verdict and judgment for the defendant; and the plaintiff appealed to the Court of Appeals.

*Harper* and *Bayly*, for the appellant, contended that, under the decision in *Dorsey vs. Hammond*, ante, 190, the Court ought not to have given any direction to the jury. In the grant the land is stated to lie "next adjoining the land of H. Morgan." This expression is repugnant to the course and distance which runs it across the land of H. Morgan. This is as much a case of double location as the grant of Cole's Harbor in *Helms vs. Howard*, 2 H. & McH. 57, which the Court said should be left to the jury. *Davis vs. Batty*, post, 264.

*Martin*, (Attorney-General, and *Key*, for the appellee.

\* THE COURT OF APPEALS affirmed the judgment of the General Court, at November Term, 1804. **264**

## GENERAL COURT, MAY TERM, 1802.

DAVIS *et al.* Lessee vs. BATTY.

The commissioners appointed under the land law of 1715, ch. 45, acted judicially, and their judgment is conclusive between the parties, unless reversed on an appeal; and as between strangers the proceedings are evidence in the same manner that hearsay is admissible to prove the bounds of land.

The deposition of a witness taken under a land commission legally executed, cannot be read in evidence unless there is proof of the death of the witness. (a)

Where a grant describes the tract of land as lying on the W. side of Chesapeake Bay, and on the W. side of S. River of that bay, beginning at a marked oak standing near a marsh of the said river, called Selby's Marsh, bounding on the E. with a line drawn N. W. and by N. from the said oak, &c. (sundry courses having calls) unto the land of J. W. and then with the said land, containing, &c. *Held*, by the Court of Appeals to be ambiguous, and therefore left to the determination of the jury—thereby dissenting from the decision made by the General Court in this case. (b)

The allowance for the attendance of a witness, who was *subpoenaed*, but not sworn at the trial, is not to be taxed in the costs, unless directed by the Court, on application.

**EJECTMENT** for a tract of land called Brown's Discovery, lying in Anne Arundel County. Defence on warrant, and plots returned.

1. The plaintiff at the trial produced and read in evidence to the jury, a certificate of survey and grant of the tract of land called Brown's Discovery, the former dated the 19th of July, 1762, and the latter dated the 9th of June, 1764, founded upon a special warrant granted to William Brown for 50 acres of vacant land; and proved that the said land is located on the plots in this cause, beginning at the figure 1. He also read in evidence a deed of bargain and sale, dated the 19th of May, 1769, from Samuel Chase and William Brown, the patentee, to Robert Davis, for the said land, and offered evidence that Robert Davis died intestate, leaving Robert Payne Davis his heir at law, \* who became seised of the said land; and that  
**265** R. P. Davis also died intestate in the year 1793, leaving the lessors of the plaintiff his heirs at law; and that since the commencement of the present action, Frances and James, two of the said lessors of the plaintiff, have died. He also offered in evidence a certificate of survey<sup>o</sup> of a tract of land called Selby's Marsh, dated the 25th of September, 1652, hereafter set forth.

The defendant on his part offered in evidence the certificate and grant of Selby's Marsh, the first dated the 25th of September, 1652,

(a) See *Weems vs. Disney*, 4 H. & McH. 105, note (b.)

(b) See *Carroll vs. Norwood*, 5 H. & J. 155; *Thomas vs. Godfrey*, 3 G. & J. 142.

and the last the 26th of April, 1658; also the original record of the proceedings of certain commissioners on the petition of Joshua Mayo and Charles Stewart, dated the 7th of June, 1717, lodged in the office of the clerk of Anne Arundel County Court, and by him brought into Court, and which is as follows: "Joshua Mayo and Charles Stewart's petition. To the gentlemen commissioners of Anne Arundel County appointed for the ascertaining the bounds of land, and deciding the differences between parties thereon, &c. The humble petition of Joshua Mayo and Charles Stewart humbly sheweth, that your petitioners are seised, in fee simple, of a tract of land lying on the S. side of S. River, originally granted to Edmund Towning of the county aforesaid, in the bounds of which your petitioners conceive some irregularities, and is molested by a certain Hezekiah Linsicum from occupying, (as they conceive,) their own land; wherefore your petitioners humbly pray you'll appoint a certain time whereon to meet on the premises, in order to ascertain the bounds thereof, and decide the difference now depending; and your petitioners in duty bound shall ever pray, &c. March 13, 1716, this petition granted.

"June 7, 1717. At a meeting held of the commissioners appointed for ascertaining the bounds of land, on the petition of Joshua Mayo and Charles Stewart, complainants, against Hezekiah Linsicum, defendant. Commissioners present, Thomas Larkin," &c. "Gentlemen, and they proceeded on the premises of the above petition. William Brewer, aged about fifty-three \* years, being sworn, deposeth as follows: That his brother, John Brewer, and **266** Nathaniel Hethcoat, told him, that the tree we are now at, being a gum, was a bounded tree of Edward Sarson, and that to his knowledge it hath been deemed a bounded tree of Edward Sarson this forty years," &c. &c. [Here follow other depositions.] "June 7, 1717. Pursuant to the directions of the commissioners appointed for ascertaining the ancient metes and bounds of land in Anne Arundel County, upon the petition of Joshua Mayo and Charles Stewart, complainants, against Hezekiah Linsicum, defendant, upon the bounds of a tract of land formerly laid out for Edward Towning of the said county, lying in S. River, now in the tenure of the said Joshua and Charles, I, Thomas Stockett, Junior, surveyor appointed by the said commissioners, began at a bounded gum tree standing at the head of a branch, which was proved by the evidence of William Brewer and Thomas Harris, to be the original bounded gum mentioned in the original certificate of survey of the said land on the W. thence S. 57 $\frac{1}{2}$ ° Easterly 67 perches, to the line of Selby's Marsh, and bounding on the S. with the said land by a line drawn S. E. and by S. 150 perches, to the spot where the original bounded tree of Selby's Marsh was adjudged to stand by the said commissioners, which included the land in dispute, and was ascertained for the ancient metes and bounds of the said complainants' lands. Per me,

T. STOCKETT, Jr."

[Here follows the plot.]

"*Mayo and Stewart, Compl. vs. Linsicum, Defendant.* The whole cost is 1,258 lbs. tobacco. Judgment for the complainant for 12 lbs. tobacco damages, done the land in dispute, and 629 lbs. tobacco, part of the cost of suit for their vexation, the other 629 lbs. tobacco, part of the cost abovesaid, we find reasonable to be paid by the complainants, the resurvey upon the premises being in other respects of great service to the complainants; and further, that the complainants shall hold the land from Pyther's Creek, at the end of the W. S. W. course, **267** by the following courses: S. 57 $\frac{3}{4}$  E. \* 67 perches, to the line of Selby's Marsh, thence S. E. and by S. 150 perches, with the said land, to the spot where the beginning tree of Selby's Marsh was adjudged to stand, at which place was set a cedar post by order of the commissioners, thence bounding on the water to the beginning, as per the plot thereof doth appear.

"Signed per order of the Commissioners, F. WARMAN, Clk."

The defendant also produced and read to the Court, an Act of Assembly passed at April Session, 1715, ch. 45, entitled, "An Act for ascertaining the bounds of lands within this Province."

To the reading of which proceedings and plot to the jury, the plaintiff by his counsel objected.

*Ridgely, Shaaff, and Johnson*, for the plaintiff.

*Martin*, (Attorney-General,) and *Key*, for the defendant.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.) The Court are of opinion, that the commissioners under the Act of 1715, ch. 45, acted judicially; and as between the parties, their judgment and the plot would be conclusive, unless reversed on an appeal made in the manner and within the time prescribed by that Act; and as between other persons, the proceedings are admissible as evidence on the same ground that hearsay is admissible to prove the bounds of land.

The Court are therefore of opinion, that the record of the proceedings and plot are legal and proper evidence in this cause, and admit the same to be read to the jury. The plaintiff excepted.

2. The plaintiff offered in evidence the certificate and patent of the tract of land called Brown's Discovery, as before mentioned, and the plots and explanations returned in this cause, to prove his title **268** to the \* said land, which it is admitted is truly located on the plots.

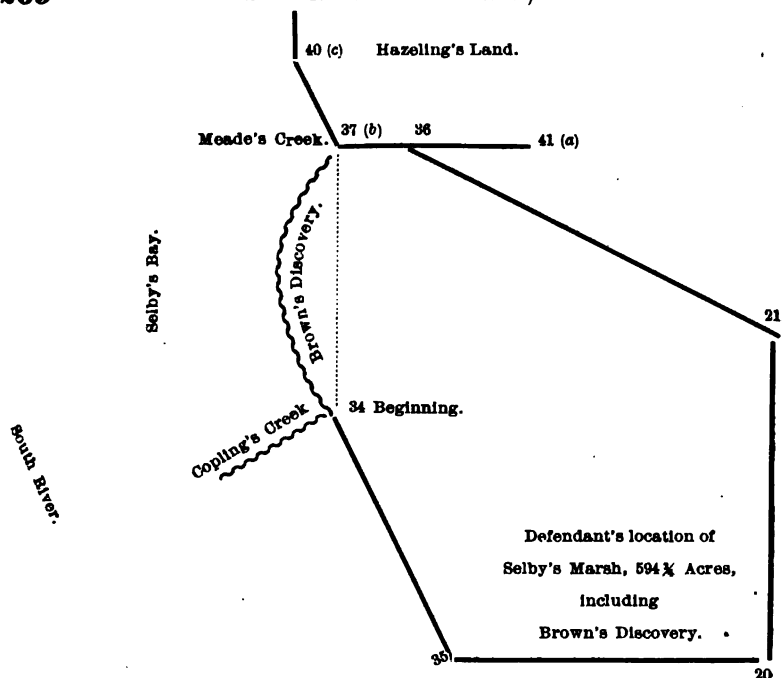
The defendant offered evidence that he had truly located on the said plots Meade's Creek, South River, Selby's Bay, and Copling's Creek. He also offered in evidence the certificate and grant of the tract of land called Selby's Marsh, before mentioned, which describes said land as "lying on the W. side of Chesapeake Bay, and on the W. side of South River of that bay, beginning at a marked oak standing near a marsh of the said river, called Selby Marsh, bounding on the E. with a line drawn N. W. and by N. from the said oak,

for the length of 150 perches, on the N. with a line drawn W. from the end of the former line for the length of 170 perches to a marked poekicory tree on the W. with a line drawn S. and by W. from the said poekicory for the length of 150 perches to a marked oak, on the S. with a line drawn E. S. E. from the said oak for the length of 170 perches unto the land of John Watkins and Jeremy Hazeling, and then with the said land, containing and now laid out for 490 acres more or less." The defendant also offered evidence to prove that the beginning of the tract of land called Selby's Marsh (at figures 34 on the plots returned in this cause) was placed on and by the side of the same waters, viz. Meade's Creek, South River, Selby's Bay and Copling's Creek, which the fifth line of Selby's Marsh struck at the point 37, (being at the end of a line from the termination of the fourth course expressed in the grant) according to the defendant's location on the plots.

The plaintiff then prayed the opinion of the Court and their direction to the jury that the defendant's location on the plots in this cause of Selby's Marsh was not according to the certificate and grant of the said land, and that if the jury were of opinion, from the evidence, that the plaintiff had made title to the land called Brown's Discovery, he was entitled to recover in this action.

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\* POSITION OF THE LANDS, &c.



- (a) The beginning of the fourth line of Hazelings's land.
- (b) The fourth line of Hazelings's land, and the edge of Meade's Creek.
- (c) The end of the second line of Hazelings's land.

CHASE, Ch. J. (DONE, J. concurring.) The Court are of opinion that the grant of Selby's Marsh is truly located on the plots in this cause by the defendant, if the jury find Meade's Creek, South River, Selby's Bay and Copling's Creek are truly located on the said plots, and the beginning of the said tract of land called Selby's Marsh is placed on and by the side of the same waters which the fifth line of Selby's Marsh strikes at the point designated by figures 37, according to the defendant's location. That all the land lying on the west side of Chesapeake Bay and on the west side of the South River of that bay is included within the lines and bounds of the grant of Selby's Marsh.

DUVALL, J. dissented. He observed that the expression in the certificate and grant of Selby's Marsh "unto the land of John Watkins and Jeremy Hazelings," terminated the course, and the home line then \* commenced; that the after expression, "then with the said land," had no operation.

The plaintiff excepted to the opinion of the Court. Verdict and judgment for the defendant. The plaintiff appealed to the Court of Appeals (a).

*Shaff and Ridgely*, for the appellant. On the first bill of exceptions cited *Weems vs. Disney*, 4 H. & McH. 156. On the second bill of exceptions said that two questions occur—1st, Can the grant be located? 2d, Is the location made by the defendant a true one? The tract called Selby's Marsh has no connecting home line, and therefore nothing passed by the grant. The description is so loose as to pass nothing. 8 Com. Dig. tit. Grant, E. 14, 445; G. 6, 449; *Shep. Touch.* 250. The lines of this tract can never get to the beginning by running with the land of Watkins and Hazelings, and they cannot meander with the river or Selby's Bay to the beginning, there being no given line. The expressions in the grant being doubtful, it should have been left to the jury to determine the location. *Dorsey vs. Hammond*, ante, 190; *Helms vs. Howard*, 2 H. & McH. 57, 83. Even if the General Court had thought the defendant's location right, it was proper for the jury to decide that fact.

*Martin*, (Attorney-General,) and *Key*, for the appellee.

\* The Court of Appeals, at June Term, 1804, reversed the judgment of the General Court, dissenting from that Court in the opinions expressed in both of the bills of exceptions. The opin-

(a) In this case witnesses had been *subpœnaed* by the defendant, who were not sworn at the trial. BY THE COURT—It will be a good general rule not to tax in the costs the allowance made to a witness for his attendance, who was not sworn on the trial. The Court will, on affidavit, decide whether a witness not sworn at the trial was necessary to be *subpœnaed*; and if it appears to them that it was necessary, they will then order the allowance made for the attendance of such witness to be taxed in the costs of suit.

ion in the first bill of exceptions was dissented from, because the deposition of William Brewer was permitted to be read in evidence to the jury, it not being stated that he was dead; and the opinion in the second bill of exceptions was dissented from for the reasons stated in the case of *Dorsey vs. Hammond*, that it was a matter of fact for the jury, and not for the Court to decide.

*Procedendo* awarded.

## GENERAL COURT, MAY TERM, 1802.

### DARNALL'S Lessee vs. GOODWIN.

The deposition of a witness taken upon a survey of the land made under a warrant issued in a former ejectment, between persons under whom the present parties claim, not permitted to be read in evidence in a new ejectment, although the witness was a non-resident of the State, and upwards of 80 years of age, due diligence not having been used to procure the attendance of the witness. (a)

Under what circumstances such a deposition may be read in evidence.

The jury are not estopped or concluded by the locations made by either party on the plots, so that the part for which they give their verdict is included within the plaintiff's claim. (b)

**EJECTMENT** for a tract of land called the Land of Promise, lying in Baltimore County. Defence on warrant, and plots returned.

The defendant, to prove the issue on his part, and to establish his location of a tract of land called Affinity, for which he took defence, and to disprove the location of the same tract as made by the plaintiff, offered to read in evidence the depositions of Thomas Nicholls, Senior, duly taken on a survey made under the authority of this Court in a suit then depending in it between Henry Bennett Darnall's lessee, plaintiff, (under whom the present plaintiff claims,) and the present defendant, for the same land for which this suit is brought, and proved that the said Nicholls had moved from this State between two or three years past to Kentucky or Tennessee, being then eighty years of age, and, if living, was living in one of those States, and had resided there from his first removal out of this State.

The plaintiff then also offered evidence to prove that a letter from the grandson of the said Nicholls was received within the last year, stating that the said Nicholls was then alive, and able to walk ten \* miles a day to meeting; and further proved that the place where the said Nicholls removed to, and where he resides, was well known in the neighborhood where the lands in dispute in this cause lay. And no evidence being produced on the part of the defend-

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(a) Distinguished in *Howard vs. Moale*, 2 H. & J. 273.

(b) See *Hammond vs. Norris*, 2 H. & J. 149.

ant to prove Nicholls dead, and no commission or other process having issued to obtain his testimony, or other means used to obtain it, the plaintiff's counsel objected to the said depositions being read to the jury.

*Hall, Key, Hollingsworth, and Scott*, for the plaintiff.

*Martin*, (Attorney-General,) and *Mason*, for the defendant, who cited *Esp.* 755; *Bull. N. P.* 236; *Doug.* 90, 93, 205, 216; 7 *T. R.* 261; 5 *T. R.* 371.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurring.) The Court are of opinion that the depositions of Thomas Nicholls ought not to be read in evidence to the jury.

The general principle is that where the witness is dead his deposition may be read, or where due diligence has been used and he cannot be found, there the Court have permitted the reading of his deposition. The Act of Assembly authorizes the sending of a commission to take the deposition of witnesses who reside out of the State, and the defendant might have obtained one for that purpose, and if the commissioners had certified that the witness could not be found, there would then, perhaps, have been a reasonable ground for admitting the depositions in evidence.

The mode of perpetuating testimony in England is by filing a bill in Chancery and taking out a commission. The Court know of no instance where such commission ever went from the Courts of common law in that country.

The Chief Judge said he recollected a case in the General Court for the Eastern Shore, where it was stated that the witness lived in Kentucky, and no commission had been taken out to obtain his testimony, and the Court refused to let his deposition be read in evidence. The defendant excepted.

\* Verdict and judgment for the plaintiff, "according to the  
284 following location on the plots: From black A to black N, at the Glade, from thence to black G, by the Falls of Gunpowder, from thence to black figures 26, from thence to black H, from thence with the black lines shaded yellow to the figures 15, 16, 17, 18, 19, 20 to 21 to 25, thence with the black lines shaded blue to black letter C, and from thence to the beginning at A."

The defendant appealed to the Court of Appeals.

*Martin*, (Attorney-General,) for the appellant, contended that the depositions of Nicholls ought to have been admitted in evidence. They were taken in course of judicial proceedings, under legal authority, in due manner, the parties having full opportunity to cross-examine. From his great age when he left here it is uncertain whether he is alive, and since, if alive, he was out of the jurisdiction of the Court, his depositions ought to have been admitted as if his death had been proved. *Holmes vs. Pontin, Peake's N. P.* 99; *Cogh-*



*lan vs. Williamson, Doug. 93; Barnes vs. Trompowskey, 7 T. R. 261; Peake's Evid. 66; 1 Bos. and Pul. 360.*

*Key*, for the appellee. The jury have found a different location than that laid down by the plaintiff. They gave him less land than he claimed, but within his pretensions. The jury have a right to do this.

\* The Court of Appeals, at November Term, 1804, affirmed the judgment of the General Court. Upon the question stated **289** in the bill of exceptions that due diligence had not been used to procure the testimony upon the second trial one of the Judges, (DENNIS,) had great doubts whether, as the defendant in the Court below had obtained the testimony in the first action, he was not excused from endeavoring to procure it at the trial had in this suit, when he considered himself as possessing it under the survey in the former suit.

### GENERAL COURT, MAY TERM, 1802.

#### KIRWAN vs. LATOUR.

An action may be maintained, in the name of an insolvent debtor, for property belonging to him before his discharge, unless a trustee has been appointed who has accepted the trust, and to whom a deed has been executed.

Where a lot of ground and still-house thereon were sold under a *feri facias*, it was *Held*, that the pumps, cisterns, iron grating and door, distillery and horse-mills passed to the purchaser, but not the joists, vats, buckets, pickets and fossits, which were not fixed to the freehold.

Such a sale is to be considered as a case between vendor and vendee, which is different from that of landlord and tenant. In the latter case the tenant is allowed to remove many things which may be considered as fixed. This is for the benefit of trade, and where a tenant puts up anything for the purpose of carrying on his trade, he may remove it. (a)

TROVER to recover damages for 48 vats and covers, stills, worms, buckets, &c. It appeared in evidence on the trial that a house and lot belonging to the plaintiff had been taken under a *feri facias* and sold, that the defendant was the purchaser, and the sheriff, by deed, conveyed to him the house and lot therein described, with the improvements. This house was built for a distillery, and the implements necessary to carry on the business were on the premises at the time of the sale.

1. *Hollingsworth*, for the defendant, objected to this action being sustained in the name of John Kirwan, the present plaintiff. He stated

(a) Cited in *McKim vs. Mason*, 3 Md. Ch. 204. Cf. *R. R. Co. vs. Canton Co.* 30 Md. 347.

that on the 3d of January, 1800, an Act of Assembly passed for the relief \* of sundry insolvent debtors, in which the plaintiff's name was included, who, on the 11th of January, 1800, filed his petition in the office of the Court of Chancery, praying to be admitted to the benefit of the said law. Annexed to his petition was a schedule of his property, and, among other property therein enumerated, are "a still-house and apparatus and utensils for carrying on a distillery." That the person of the plaintiff was released by the Chancellor on the 13th of February, 1802, and John Coulter was appointed his trustee. That by the 8th section of the said Act of insolvency, the trustee may sue for, in his own name, and recover, any property or debts assigned to him by any debtor in virtue of the said law. That the writ in this cause issued on the 13th of September, 1800, after the plaintiff had been included in and had applied for the benefit of the said law. He prayed the Court to direct the jury that the plaintiff can only support an action for damages for the use of the property to the 3d of January, 1800, and that for the value of the property an action can only be supported in the name of the trustee.

*Harper*, for the plaintiff, contended, that as no deed had been made to the trustee, the plaintiff may sustain the action, and that there was no evidence even of the acceptance of the trust by the trustee.

CHASE, Ch. J. The legal right to the property remains in the plaintiff until there is an acceptance of the trust by the trustee, and a deed of assignment executed by the insolvent debtor transferring all his property to his trustee. The person of the plaintiff is discharged, but he is still liable to be sued, and execution may go against his person and property.

2. *Hollingsworth*, then moved the Court to direct the jury that the apparatus and utensils for carrying on a distillery were fixtures annexed to the freehold, and passed by the sheriff's sale and deed to the defendant. That as the defendant had purchased the still-house, the fixtures passed by the sale, as the sheriff's deed describes it as a lot of land, &c. "with the improvements thereon."

291 \* *Harper*, contended, that whatever is part of the improvements of a trade may be removed, and are not fixed to the freehold, and are always so considered between landlord and tenant. 1 Atk. 477.

CHASE, Ch. J. The question arises upon the operation of the schedule annexed to the *feri facias*, and the sheriff's deed. It must be considered as a case between vendor and vendee, the sheriff standing in the place of vendor, and selling his right. In this case every thing passed which was annexed to the freehold. If the deed had been for the conveyance of the house and lot only.

without mentioning the improvements, it would have carried all things fixed to the freehold. The case of vendor and vendee is different from that of landlord and tenant. In the latter case the law allows the tenant to remove many things which may be considered as fixed. This is for the benefit of trade; and where a tenant puts up any thing for the purpose of carrying on his trade, he may remove it. The pumps, cisterns, iron grating, and door, distillery and horse mills, passed by this deed, but not the joists, rats, buckets, pickets and fossits, which are not fixed to the freehold. The Ch. J. cited *Esp.* 358, 359; *Salk.* 368; *Bull. N. P.* 34.

Verdict for the plaintiff, and damages assessed to 418*l.* 17*s.* 6*d.* current money. Judgment on the verdict.

### GENERAL COURT, MAY TERM, 1802.

#### JACOB'S Lessee *vs.* KRANER.

Certain deeds defectively acknowledged by a *feme covert* grantor, were held not to pass the estate in the land to the grantee.

EJECTMENT for Cooke's Adventure Resurveyed, Angell's Fortune, and Monk's Discovery, three parcels of land lying in Baltimore County. The following case was stated for the opinion of the Court, viz. The Lord Proprietary's grants of the above mentioned tracts of land were legally made, and afterwards a certain Rinaldo Monk became seised and possessed of the said lands, of which he died seised and possessed, having by his last will and testament duly made and \* executed, devised the same in fee simple to his daughter Mary Monk, who after his death in virtue of the said devise entered upon and was seised of the said lands, and intermarried with one William Jacob on the 19th of July, 1772. That the said Mary died in the life-time of the said William, her husband, some time in the year 1781, and that the said William died some time in the year 1790. That Rinaldo Jacob, the lessor of the plaintiff, is the eldest son and heir at law of the said William and Mary. That in the life-time of the said William and Mary, they executed two deeds to the defendant, the first, dated the 18th of April, 1776, for part of two tracts of land, viz. part of Cooke's Adventure Resurveyed, and part of Angell's Fortune, was acknowledged as follows, to wit: "Baltimore County, *sc.* Came William Jacob, and Mary his wife, before us the subscribers, two of the Lord Proprietary's justices of the peace for the county aforesaid, and severally acknowledged the within instrument of writing to be their act and deed, and the lands within mentioned to be the right and estate of the within named Michael Kraner, his heirs and assigns, for ever. At the same time the said Mary, the wife of William

Jacob, being privately examined apart from and out of the hearing of her said husband, did declare she made the said acknowledgment of her own free will and consent, without being induced thereto by any threats of her husband, or fear of his displeasure. Before us,

JAMES CLARKE,  
WM. RUSSELL."

The other deed, dated the 28th of March, 1780, for Cooke's Adventure Resurveyed, was acknowledged as follows, viz. "Baltimore County, to wit: On the 28th of March, 1780, before the subscribers, two justices of the peace in and for the county aforesaid, came William Jacob, and acknowledged the within bargained and sold land and premises to be the right and estate of the within named Michael Kraner, his heirs and assigns, for ever. At the same time

**293** came Mary Jacob, \* wife of the said William Jacob, and being by us privately examined apart from and out of the hearing of her said husband, acknowledged all her right and title to the within bargained and sold land and premises, to be the right and estate of the within named Michael Kraner, his heirs and assigns, for ever; and that she made this acknowledgment of her own free and voluntary will and accord, without being induced thereto by fear of threats of her said husband, or through fear of his displeasure.

GEO. LINDENBERGER,  
PETER SHEPHERD."

Both deeds were recorded on the day of their respective dates.

That the defendant by virtue of the said deeds entered upon and has possessed the said lands therein mentioned since that time. The lease, entry, and ouster, as laid in the ejectment, are also admitted; and if upon the whole, &c.

*Martin*, (Attorney-General,) for the plaintiff.

*Harper*, for the defendant.

The question in this case arose on the form of the acknowledgments, made by the *feme covert* grantor to the deeds above stated.

The General Court gave judgment upon the case stated, for the plaintiff, for possession and costs.

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#### GENERAL COURT, MAY TERM, 1802.

##### PEDDICOART'S Lessee *vs.* RIGGES.

A deed defectively acknowledged by a *feme covert* grantor held not to pass a title in the land to the grantee.

EJECTMENT for a tract of land called the Invasion, lying in Anne Arundel County. The defendant took defence for all the land included in the deed to him from William Peddicoart, and Sophia his wife, as located on the plots returned in the cause.

The plaintiff at the trial, offered in evidence a patent for the land called The Invasion, granted to Adam \* Barnes on the 24th of September, 1747, for 1,187 acres, which is truly located on the said plots. He also proved that Adam Barnes, the grantee of the said land, executed a deed to Sophia Peddicoart, on the 22d of October, 1764, for 131 acres, part of the said land, whereby he conveyed to the said Sophia Peddicoart, and the heirs of her body lawfully begotten, for ever, the said land, which said land is truly located on the plots. He also proved that the lessor of the plaintiff is the issue in tail and heir of the body of the said Sophia Peddicoart. **294**

The defendant then offered evidence that the said Sophia was married to William Peddicoart, and that they executed a deed to the defendant on the 9th of June, 1778, (a) for a moiety of the tract of land called The Invasion, which said deed was acknowledged as follows, viz: "Baltimore County, 9th day of June, 1778, then came before us, two justices of the peace for the county aforesaid in the State of Maryland, the within named William and Sophia Peddicoart, and severally acknowledged the within indenture to be their act and deed, and the land and premises therein mentioned to be the right and estate of the within named James Rigges, his heirs and assigns, for ever. Taken and acknowledged, according to the Act of Assembly in that case made and provided, before us, the day and year above written.

JOHN CRADOCK,  
RICHARD CROMWELL."

The said deed was duly recorded on the 19th of June, 1778, in the records of Anne Arundel County, having a certificate annexed by the Clerk of Baltimore County Court, that Mess. Cradock and Cromwell were justices of the peace, &c. duly commissioned and sworn.

It was proved that the said William Peddicoart, and Sophia his wife, were both dead before the bringing the present ejectment.

Whereupon the plaintiff prayed the opinion of the Court, and their direction to the jury, that the said \* deed from the said William Peddicoart, and Sophia his wife, did not bar the plaintiff from his recovery in this action. **295**

*Martin*, (Attorney-General,) for the plaintiff.

*Ridgely* and *Shaaff*, for the defendant.

CHASE, Ch. J. (DUVALL, J. concurred.) The Court are of opinion, that the deed from William Peddicoart, and Sophia his wife, to the defendant, does not bar the plaintiff in this case; and they direct the jury accordingly. The defendant excepted.

Verdict and judgment for the plaintiff. The defendant brought a writ of error, but *non prossed* it at November Term, 1804.

(a) The first Act of Assembly which directed that a common deed of bargain and sale should operate in the same manner as a common recovery to bar an estate tail, passed in June, 1773. ch. 1.

## GENERAL COURT, MAY TERM, 1802.

CHENEY'S Lessee *vs.* WATKINS.

Defence on a warrant may be changed to general defence on the defendant's paying the costs of the survey.

**EJECTMENT.** The defendant had taken defence on warrant at a preceding term, and the lands were located on the plots returned in the cause.

*Johnson* moved for leave to change the defence on warrant, to that of general defence.

**THE COURT.** Let the defence be changed, upon the defendant's paying the costs of the present survey.

## GENERAL COURT, MAY TERM, 1802.

NORWOOD *vs.* SHIPLEY.

The plaintiff to recover in an action of trespass must show title or that he was in the actual possession of the place where, &c. when, &c. (a)

**TRESPASS *q. c. f.*** Plots made and returned.

**THE COURT** in this cause determined that the plaintiff must show title to the land on which he charges the trespass to be committed, or he must show that he was in the actual possession of the place where the \* trespass was committed, at the time when it was committed.

**296**

*Ridgely, Mason, and Shaaff*, for plaintiff.

*Martin*, (Attorney-General,) and *W. Dorsey*, for defendant.

(a) Affirmed in *Ridgely vs. Bond*, 17 Md. 22, and in *Blaen Avon Coal Co. vs. McCulloh*, Court of Appeals, October Term, 1882. In *Gent vs. Lynch*, 23 Md. 65, it is said that the case in the text does not decide that trespass *q. c. f.* will lie without possession, but that it will lie upon that possession which the law implies to be in the owner of land, when no other person is, in point of fact, on it. In such case the owner has, constructively, the possession. Cf. *Dorsey vs. Eagle*, 7 G. & J. 321; *Hale vs. Munroe*, 28 Md. 98; *Ridgely vs. Ogle*, 4 H. & McH. 86; *Davidson vs. Beatty*, 3 H. & McH. 314.

## GENERAL COURT, MAY TERM, 1802.

NORWOOD'S Lessee *vs.* OWINGS.

If one party gets a commission to take testimony on the terms that whether it be returned or not, the cause shall not, on that account, be continued at the ensuing term; yet if it be returned executed at the ensuing term, the adverse party has a right to a continuance till he has time to examine the testimony, that he may have an opportunity of disproving it if he thinks necessary.

**EJECTMENT.** The defendant at the preceding term obtained a commission to London for the purpose of taking testimony, upon the terms that if the commission was not returned at the present term it should be no cause for a continuance of the action. At the present term the commission was returned, with testimony taken thereunder; and on motion of the plaintiff's counsel,

**THE COURT** directed the action to be continued, on the ground that the commission and testimony having been returned at this term, the opposite party should have time to examine the testimony, and if he thought proper, to endeavor to counteract it. That although the defendant was not entitled to a continuance, agreeably to the terms under which the commission was granted, yet the plaintiff was.

*Ridgely, Mason, and Johnson*, for plaintiff.

*Martin*, (Attorney-General,) *Key* and *Shaafl*, for defendant.

## GENERAL COURT, MAY TERM, 1802.

KIRWAN *vs.* RABORG.

If A. purchases stills of B. and pays him the purchase money, and B. afterwards takes the stills in possession, the proper remedy is trover, and A. cannot support assumpsit against B. to recover back the purchase money. On paying costs, a party may amend from assumpsit to trover.

**ASSUMPSIT** for money had and received. The evidence was, that the plaintiff bought of the defendant certain stills, for which he paid him 400 dollars. That \* the defendant afterwards took possession of the same stills, and then had them in his pos- **297**  
session. This action was to recover back the money paid.

*Scott*, for the defendant, objected to the form of action.

**THE COURT.** The action is not well brought, it should be trover.

*Harper*, for the plaintiff, had leave to amend, on paying the whole costs which had accrued in the action down to and including the present term.

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GENERAL COURT, MAY TERM, 1802.

WILSON *vs.* BOYER.

A guardian has no right to retain money received by him from the executor  
 • unless the executor has passed a final account with the Orphans' Court,  
 and an order had been passed by that Court to pay over such money to  
 the guardian.

ASSUMPSIT for money lent. It appeared in evidence at the trial, that the plaintiff was executrix of her deceased husband, and the defendant was guardian to the children of the deceased. The defence set up was, that the guardian had received the money, for which the action was brought, from the plaintiff as executrix, and that he had a right to retain it as guardian to the children. No settlement of any account in the Orphans' Court by the executrix was proved.

*Boyd*, for the plaintiff, prayed the Court to direct the jury, that unless the defendant could prove that the plaintiff had settled a final account with the Orphans' Court, and there was a balance in her hands as executrix, and an order from the Orphans' Court to pay it over to the defendant as guardian, he had no right to withhold the money.

THE COURT gave the direction accordingly.  
*Brice*, and *McMeehan*, for the defendant.

KIRKPATRICK'S Lessee *vs.* KYGER.

Where a grant of land contained the following descriptions, beginning at a bounded white oak standing about 20 perches on the E. side of Anteatum, running thence N. &c. (twelve courses,) then S. 84 degrees, W. 243 perches, to the end of 73 perches on the fourth line of Good Luck, then with said land reversed S. 28 degrees, W. 73 perches, S. 82 degrees, W. 46 perches, N. 58 degrees, W. 75 perches, then S. 73 degrees, W. 20 perches, &c. *Held*, that the true location of the grant was to run the course S. 28 degrees, W. 73 perches, reversed with Good Luck, then course and distance according to the expressions in the grant.



EJECTMENT for a tract of land called Dickson's Pleasure, lying in Washington County. The defendant took defence on warrant, and plots were returned.

At the trial the plaintiff offered in evidence the certificate of the land called Dickson's Pleasure, surveyed the 1st of March, 1760, and a grant thereof to Michael Kirkpatrick, dated the 7th of October, 1760, describing the same as "beginning at a bounded white oak, standing about 20 perches on the east side of Anteeatum, running thence N." &c. &c. the thirteenth course is "S. 84° W. 243 perches, to the end of 73 perches on the fourth line of Good Luck, then with said land reversed S. 28° W. 73 perches, S. 82° W. 46 perches, N. 58° W. 75 perches, then S. 73° W. 20 perches," &c. &c. The tract of land called Good Luck was surveyed the 20th of September, 1742, for Daniel Dulany, and granted to Jacob Funk on the 28th of February, 1753, beginning at a bounded white oak standing on the west side of Anteeatum, within 10 perches thereof, and running N. 30° E. 84 perches, then N. 73° E. 54 perches, then S. 140 perches, and then by a straight line to the beginning tree, containing 50 acres.

*Shaff*, for the defendant, contended, that the plaintiff had not located Dickson's Pleasure on the plots, according to the grant. That the defendant had counterlocated the plaintiff's location. The expression in the grant is S. 82° W. 46 perches, and the line cannot be elongated, whereas the plaintiff has located it N. 121 perches. The true meaning of the grant is to reverse only one line of Good Luck; and if it is reversed, the length of line cannot be exceeded. There is no call in the grant to authorize the extension of the line. As there is a variance between the grant and location on the plots, the plaintiff must fail to recover. His evidence does not support his location.

\* *Mason* and *J. Buchanan*, for the plaintiff, contended, that there was a call in the grant of Dickson's Pleasure which **299** must be gratified. That the line must continue to run with the land two courses, which will spend the number of perches. That all the locations on the plots were admitted, but Dickson's Pleasure, and that the expressions used in the grant of that land, must be gratified.

CHASE, Ch. J. The Court are of opinion that the true construction of the grant of Dickson's Pleasure is to run the course S. 28° W. 73 perches reversed with Good Luck, then course and distance according to the expressions in the grant.

A juror was then withdrawn, and leave given to amend the plots, on payment of the costs of the term.

## GENERAL COURT, MAY TERM, 1802.

RINGGOLD'S Lessee *rw.* MALOTT.

The time when a manor was laid out is a matter of fact for the jury, there being no record thereof to be found.

The opinion of the Judge of the land office cannot conclude the parties as to a question of law or fact.

The General Court has a concurrent jurisdiction with the Judge of the land office, as to the extent and operation of interfering grants; and it is the peculiar province of the jury to decide facts.

The relation of a grant to the certificate of survey so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law.

An attempt to take up land within the proprietary's reserve was a fraud, and no equitable interest was acquired in the land so taken up.

The State stands in the place of the proprietary as to all lands belonging to him at the time of the Act of confiscation.

**EJECTMENT** for a tract of land called The Number of Four, situate in Washington County, and being a part of the reserve around Conogocheige Manor, and containing 481 acres. Plea general issue, and defence upon warrant. Plots were returned.

The plaintiff at the trial to make title to the land in the declaration mentioned, produced and read to the jury the order for reserving for the Lord Proprietary a manor of 10,000 acres of land, viz. "May 28, 1724. Whereas in the behalf of his Lordship the Lord Proprietary of this province, you are hereby required to reserve for his lordship's use the quantity of ten thousand acres of land, in places within this county as you shall be directed to lay out the same, and within such metes and bounds as may be most profitable to his lordship; and return your certificate of survey thereof into his lordship's land office, with all convenient speed, thence to be transmitted to the examiner-general for due examination; and for your so doing, this shall be your warrant. Given under his lordship's lesser seal at arms, this 28th day of May, *anno dom.* 1724.

**300** \* To his lordship's surveyor of Prince George's County." The plaintiff offered evidence to the jury to prove, that this is the order for reserving and surveying Conococheague Manor. That in virtue of this order, Conococheague Manor was actually laid out and surveyed previous to the year 1730, and was at that time known and established as Conococheague Manor. The plaintiff then produced and read to the jury the Lord Proprietary's order for reserving certain lands around his lordship's manors, dated the 28th June 1731, viz. "Sir—Whereas his lordship the right honorable the Lord Proprietary of this Province of Maryland, hath ordered to make a resurvey upon all his honors, manors and lands, and to enlarge the same on both shores of this Province, I do hereby, in the

name and behalf of the right honorable the Lord Proprietary, order and require that you forthwith cause a reserve to be entered for his lordship on all vacant lands, rough or cultivated, and on all lands that are or may become escheat or forfeit to his lordship, adjoining to any of his said honors, manors or lands, or within the distance of three miles from them, or any of them. And that you likewise acquaint the several surveyors within this Province thereof, that they may behave themselves accordingly. Given under my hand this 28th day of June, *anno domini* 1731.

BEN'DT LEON'D CALVERT.

To Philemon Lloyd, Esquire, Deputy Secretary of Maryland—This.”

“In pursuance of the above order a reserve is hereby made for and to the use of his said lordship on all vacant lands rough or cultivated, and on all lands that are or may become escheatable, or any ways forfeit to his lordship, adjoining to any of his honors, manors or lands, or within the distance of three miles from them or any of them.

To all concerned.”

The plaintiff then produced and read to the jury the order for granting to John Morton Jordan the reserves on Conococheague Manor, dated the 15th of July, 1763, viz.

\* “Frederick, absolute Lord and Proprietary of the Provinces of Maryland and Avalon, Lord Baron of Baltimore, in the Kingdom of Ireland. To the honorable Benedict Calvert and George Steuart, Esquires, Judges of our Land Office in the said Province of Maryland. **301**

Gentlemen,—These are to authorize and require you immediately to pass your office a patent, or as many patents as may be necessary, to describe and ascertain the bounds of 7,753 acres of land, lying and being within the reserve round Conegochiegue Manor in Frederick County, to John Morton Jordan, or any one applying for the same in his name, or on his behalf—the said 7,753 acres being ascertained by a survey made by James Calder in 1767, and returned to my commissioners for the sale of my manors or reserved lands; which said 7,753 acres of land within the aforesaid reserve of Conegochiegue Manor, lying in Frederick County, were by account received from my said commissioners then unsold. But for the said land I have since received of the said John Morton Jordan, a full consideration. You are to take notice to reserve in the patent or patents the usual quit rents of four shillings sterling per 100 acres, payable according to the established rules of your office; and for your so doing this shall be your warrant. Given under my hand and lesser seal at arms, at London, this 15th day of July, in the 17th year of my dominion of the said Province, and in the year of our Lord 1768.

F. BALTIMORE, (L. S.)

Signed, delivered and sealed, in the presence of ROB'T EDEN.”

The plaintiff also produced and read to the jury the patent to John Morton Jordan for Reserve No. 4, dated the 7th of March, 1769, for "all that tract or parcel of land called and known by The Number of Four, lying in Frederick County, and being a part of the reserve around Conegocheige Manor, beginning," &c. containing 481 acres, agreeably to the certificate of survey thereof taken and returned into the Land

**302** \* Office, bearing date the 28th of October, 1768. The plaintiff also produced and read to the jury a deed from John Morton Jordan to Thomas Ringgold, grandfather of the lessor of the plaintiff, dated the 26th of October, 1770, whereby in consideration of £10,150 sterling money, was granted, &c. "all those several tracts or parcels of land lying and being in Frederick County, to wit: The Manor of Conegocheige, containing by patent to John Morton Jordan 10,688½ acres, and seven tracts of land lying within the reserve of the said manor, and known and distinguished in the patents or grants thereof to the said John Morton Jordan, by the numbers one, two three, four, five, six and eight. Number one containing 458 acres; number two containing 1,970 acres; number three containing 995 acres, number four containing 489 acres; number five containing 1,735 acres; number six containing 1,427 acres; and number eight containing 346 acres; together with," &c. The plaintiff also produced and read to the jury, the will of Thomas Ringgold, only child and heir at law of the above named Thomas Ringgold, the grantee, duly executed, proved and recorded, as the law directs, for passing lands and tenements, whereby the said Thomas Ringgold the son and testator, devised The Number of Four, the land in the plaintiff's declaration of ejectment mentioned, to the lessor of the plaintiff, and his heirs in fee.

The defendant offered evidence to the jury to prove, that the Manor of Conococheague was not surveyed or located until after the order for the reserves of the 28th of June, 1731—And the defendant, to show title in himself to part of the lands in the declaration mentioned, being his defence as located on the plots, produced and read to the jury a patent for a tract of land called Peter's Delight, containing 18¾ acres, granted to him on the 18th of May, 1759. The defendant also produced and read to the jury a certificate of resurvey for a tract of land called The Resurvey on Peter's Delight, containing 233¾ acres, dated the 4th of December, 1759, reciting a warrant

**303** to resurvey Peter's \* Delight, dated the 7th of June, 1759, which said certificate of resurvey is endorsed, June 5, 1761. Examined and passed." Also an endorsement that 10*l.* 15*s.* 0*d.* for vacancy, and 15*s.* 1*d.* for one year and nine months rent to Michaelmas, 1761, had been paid on the 17th of April, 1761; and also the following endorsement: "This land not to be patented, being within his Lordship's reserve of Conegocheigue Manor, as Mr. Prather says.

10th March, 1763.

EDW'D LLOYD."

The defendant also produced and read to the jury an order from the Judge of the Land Office, dated the 16th of February, 1785, for correcting that certificate, and which order is as follows, to wit: "By the Chancellor, February 16, 1785. Upon the application of Peter Malott, Ordered, that the surveyor of Washington County lay down the within tract of land, called the Resurvey on Peter's Delight, clear of Conococheigue Manor, giving due notice thereof to the parties, and return a certificate of his work herewith to the Land Office.

"Test.

JNO. CALLAHAN, Reg. L. Off. W. S."

The defendant also produced and read to the jury the corrected certificate, dated the 5th of March, 1785, with its endorsements, whereby it appears that the said tract contains, clear of Conococheage Manor, 233 acres. The said last mentioned certificate is thus endorsed: "May 7, 1785. Examined and passed." "Caveated by Paul Westerberger, 25 July, 1785." "It appears by a letter addressed to the Chancellor, dated the 14th of April, 1788, and signed Peter Malott, that the said Malott is fully satisfied that Mr. Westerberger, (the caveator of this certificate,) shall have the land that is in dispute between the said Westerberger and Malott, and that he lays no claim, right, or title to the same.

"Test.

JNO. CALLAHAN, Reg. L. Off. W. S."

"The caveat of Westerberger being withdrawn by his written order, dated the 14th of April, 1788, it is ordered by the Chancellor that a patent issue on this certificate.

"Test.

JNO. CALLAHAN, Reg. L. Off. W. S.

"October 7, 1799."

\* The defendant produced and read to the jury the patent for the said tract of land called The Resurvey on Peter's Delight, granted to the defendant on the 7th of October, 1799, for 233 acres, stating the certificate of resurvey of the 4th of December, 1759, the payment of the composition money, the order for correcting, and the corrected certificate of the 5th of March, 1785, with the description of the courses, &c. as set out in the last mentioned certificate; and the defendant offered to prove that the locations of the said land are correctly made on the plots returned in this cause; and that the land located by the plaintiff as his pretensions interferes with and includes the land of the defendant as located for his defence. The defendant further produced and read to the jury an order from Benedict Leonard Calvert, Governor of the then Province, reciting an order of the Judges of the Land Office for reserves on manors, as herein before set forth; dated the 28th of June, 1731. The defendant also produced and read to the jury the certificate of Monocacy Manor, in the following words, viz: "May the 29th, 1724. His Lordship's certificate of 10,000 acres. Monocacy Manor. Maryland, ss. In obedience to an order from his Lordship's Land Office, to reserve for his Lordship the Lord Proprietary, his use, ten thousand acres of land upon the head of Potomak River, or some one of the branches

thereof, and to survey and lay out the same within such metes and bounds as may be most profitable to his Lordship. These are humbly to certify that I have surveyed for his Lordship the Lord Proprietary all that tract of land called Monocacy Manor, lying in Prince George's County," &c. &c. Signed "James Stoddert, Dep. Surv. Prince George's County."

Whereupon the defendant, by his counsel, prayed the opinion of the Court, and their direction to the jury, that the patent granted to the defendant in 1799 did, by operation of law, relate back to the certificate, and give title to the defendant to all the land included in the said patent, which is also included in the lines of the certificate on the resurvey on Peter's Delight, \* dated the 4th of December, **305** 1759, as located on the plots returned in this cause, against the title set up by the plaintiff to the lands included in his patent of The Number of Four in the declaration of ejectment mentioned, and for which the present suit is brought.

*Shaaff, Buchanan, and Key*, for the defendant, insisted that there was a clear, equitable interest in the defendant in the land included in his resurvey of the tract called "The Resurvey on Peter's Delight," which could not be defeated by the plaintiff's grant; and that the defendant's grant must relate to the certificate of resurvey in 1759. *Selwyn vs. Selwyn*, 2 Burr. 1131; *Howard vs. Cromwell*, ante, 115. *Martin*, (Attorney-General,) and *Mason*, for the plaintiff.

**316** \* CHASE, Ch. J. (DUVALL and DONE, JJ. concurred.) The Court are of opinion that the time when Conococheague Manor was laid out is a matter of fact to be determined by the jury, and that if they find it was laid out subsequent to the 28th of June, 1731, the reserve made by the Lord Proprietary by his order of that date does not attach to it.

The opinion of the Judge of the Land Office, as far as it is expressed by his order, that patent should issue to Malott on his certificate, cannot conclude the parties in this case as to the fact when Conococheague Manor was laid out, or as to the fact whether there was any reserve annexed to it. This Court, in all questions relative to the extent and operation of interfering grants, have a concurrent jurisdiction with the Judge of the Land Office—and it is the peculiar province of the jury to decide facts.

In the case between Malott and Westerberger it does not appear to the Court that the Judge of the Land Office decided any fact by his order that patent \* should issue. The certificate having **317** been corrected pursuant to the order of the late Judge of the Land Office, and Westerberger's caveat being withdrawn, all contest between Malott and Westerberger ceased, and the order for issuing a patent to Malott on his certificate was a matter of course, no other objection appearing.

The relation of the patent to the certificate, so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law, introduced for the attainment of justice, and to prevent circuitry of action—this Court doing that which a Court of equity would effect. And it is the opinion of the Court, that if the jury find Conococheague Manor was laid out after the order of the Lord Proprietary in 1731, that in such case there was no reserve attached to it, and the defendant had a complete equitable title to the land:—But if the jury find otherwise, his attempt to take up land within the reserve, was a fraud and deception on the Proprietary and his officers, and no equitable interest was acquired in the land by his certificate and payment of the caution money.

[As between the Proprietary, and a person who takes out a common warrant, such person acquires a right to have his warrant located on any vacant land in the county, to the surveyor of which the warrant is directed, it being the inception of the contract between the Proprietary and such person, for so much vacant land as is expressed in the warrant, and no after act of the Proprietary laying out manors or making reserves, could defeat such interest. (a)]

By the Act of confiscation all British property was seised and vested in the State. The State, as to lands of the Proprietary, stood in his place, and they remained subject to all claims and rights created and acquired under the Proprietary—and supposing these circumstances to exist, which would have vested an equitable interest in Malott, his grant will have relation \* to his certificate, and control the operation of the grant to Jordan so far as they 318 interfere.

The plaintiff excepted. Verdict for the plaintiff for part only of his pretensions, (the jury being of opinion that Conococheague Manor did not exist until after the year 1731,) as to the residue the verdict was for the defendant. Judgment upon the verdict. There was no appeal to the Court of Appeals.

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#### GENERAL COURT, MAY TERM, 1802.

##### CLARKE *vs.* RAY.

The General Court decided, that if a debtor, within the purview of the Act of Congress, is imprisoned for debt, &c. for the space of three months, in such case the act of bankruptcy being committed at the end of two months imprisonment, the creditor has only one month allowed him to prefer his petition to the Judge; and if he omits to prefer one within that time, the act of bankruptcy ceases to operate from the expiration of the three months, and the debtor may avail himself of the Acts of insolvency of

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(a) This paragraph, though constituting a part of the opinion of the Court, was not inserted in the bill of exceptions which was signed.

the State. But it was held by the Circuit Court of the U. S. that a person who falls within the purview of the bankrupt law of the U. S. after commitment of three months, cannot avail himself of the benefit of a State insolvent law, if the creditors sue out a commission against him within six months next succeeding the act of bankruptcy occasioned by his commitment.

Where an agreement has been admitted in evidence, without objection, a subsequent agreement to the same effect, endorsed on the said agreement, permitted to be read also.

The delivery of every deed must be proved, as well as the execution of it, being an essential requisite to the validity of it; but the possession of a bond being with the obligee is sufficient evidence of a delivery. (a)

*Quere.* If a bill of exceptions can be taken to the opinion of the Court given on the trial of issues from the Court of Chancery? (b)

ISSUES from the Court of Chancery, to try whether James Ray was a trader, &c. within the meaning of the Act of Congress.

1. These issues arose upon an application of Ray to the Chancellor, for the benefit of an Act of insolvency passed in his favor at November Session, 1801; which was opposed by Clarke, alleging that Ray was a trader, and consequently could not be relieved by an Act of insolvency of the State.

*Mason and Shaff*, for plaintiff.

*Martin*, (Attorney-General,) and *Buchanan*, for defendant.

CHASE, Ch. J. (DUVALL, J. concurred. DONE, J. absent.) The Chancellor, by the Act of Assembly, (1801, ch. 18,) co-operating with the law of the United States, has a power to direct issues in a summary way to inquire whether a debtor, who applies to him for relief under the insolvent law, is liable to be made a bankrupt under the law of the United States. The Chancellor, pursuant to such power, has directed certain issues to be tried in this Court, and has requested the opinion of this Court on the questions (which have been discussed,) on the supposition \* that such questions would arise  
**319** out of the present case, and this Court, to expedite business, as the inquiry before the jury could not proceed, owing to the indisposition of one of them, did request the counsel to argue the said questions.

The following is the question submitted by the Chancellor: "Whether or not a man, having been arrested for debt after the 1st day of June, 1800, (when the said bankrupt law commenced its operation,) and having remained, in consequence of that arrest, three months in prison before a commission issued against him under that bankrupt law, can be deprived of the benefit of an insolvent law of this State, passed in his favor, on account of his being arrested or

(a) Approved in *Benson vs. Boteler*, 2 G. 78. See *Pannell vs. Williams*, 8 G. & J. 511; *Edekin vs. Saunders*, 8 Md. 118; *Duer vs. James*, 42 Md. 492.

(b) See Rev. Code, Art. 71, s. 10.



charged in execution for another debt, and his not having remained three months after such arrest or charging in execution before a commission issued against him under the said law?"

By the Constitution of the United States, 1st Article, 8th section, Congress have power to establish uniform laws on the subject of bankruptcies throughout the United States.

Congress have exercised the power granted under the Constitution, and passed a law declaring what persons may become bankrupts; what shall be deemed acts of bankruptcy; and prescribed the mode of proceeding against bankrupts by the Act to establish an uniform system of bankruptcy throughout the United States, passed on the 4th of April, 1800. The first section of this Act describes the persons who may become bankrupts, and specifies the several acts which shall be deemed acts of bankruptcy.

The being arrested for debt, and remaining in prison two months or more, is one of the acts of bankruptcy mentioned—many other acts are enumerated, each of which constitutes an act of bankruptcy.

No person is liable to a commission of bankruptcy, unless the petition is preferred in the manner directed by the said law, and within six months after the act of bankruptcy committed.

\* This, in general, is the time limited within which the creditor must prefer his petition in order to have his debtor declared a bankrupt. By the sixty-first section—This Act is not to repeal or annul the laws of any State, enacted or to be enacted for relief of insolvent debtors, except they are within the purview of the Act, and whose debts amount in the cases specified in the second section, to the sums mentioned therein.

If any person within the purview of the Act shall be imprisoned for three months for any debt, or upon contract, unless the creditors shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of the Act, such debtor may and shall be entitled to relief under the State laws for relief of insolvent debtors.

It must be supposed that Congress, in this law, have extended the provisions relative to bankruptcies as far as good policy and general utility required. The Act in its operation is confined to a certain description of persons, and certain specified cases of such persons. The Legislatures of the several States have competent authority to pass laws for the relief of all persons who are not comprehended within the Act of Congress. That part of the Constitution of the United States relating to bankrupts, is carried into operation by the law of Congress, as far as that body thought it was politic and expedient; and the law of Congress constitutes the only restriction which is imposed on the State Legislatures in the case of insolvent debtors.

The law allows the creditor six months to prefer his petition after an act of bankruptcy committed, in order to render the debtor liable

to a commission of bankruptcy. But this right is abridged in one case by the law; where a debtor, within the purview of the act, is imprisoned for debt or upon contract, for the space of three months, in that case the creditor has only one month allowed him after the act of bankruptcy committed. And if the creditors omit to prefer a petition within that time, the act of bankruptcy \* ceases to  
**321** operate on his case from the expiration of the three months, and the debtor may avail himself of the Acts of insolvency of the State.

Unless this exposition is given to the Act, a debtor imprisoned, who comes within the description of the bankrupt law, and whose case is one of the specified cases, would be subject to imprisonment for eight months at least.

The second section describes the proceedings which are to be had to obtain a commission of bankruptcy.

1st. The creditor is to exhibit his petition in writing before the Judge of the district.

2d. Before the commission shall issue, the creditor shall make affidavit, or solemn affirmation, before the Judge, of the truth of his or her debt.

3d. The creditor is to give bond, to be taken by the Judge in the name and for the benefit of the party charged as a bankrupt, in the penalty and with such surety as the Judge shall require, to be conditioned for the proving of his debt, proving the party a bankrupt, and to proceed on such commission.

The words of the sixty-first section "unless the creditors shall proceed to prosecute a commission of bankruptcy against him, agreeable to the provisions of this Act," refer to the proceedings in the second section for the purpose of obtaining a commission, and not to the time within which the proceeding is to be had. The time within which the commission is to be prosecuted is no part of the proceeding.

Unless the creditor shall proceed to prosecute, means unless the creditor shall exhibit his petition. The preferring a petition in writing before the Judge, is the commencement of the proceeding to obtain a commission; and unless the creditor prefers his petition before the three months expire, the debtor cannot be proceeded against under the bankrupt law.

Any person, within the purview of the Act, imprisoned for the space of three months for any debt, &c. shall be entitled to relief under any insolvent Act of the State, enacted or to be enacted. His title to relief under the insolvent laws, attached as soon as the three  
**322** \* months imprisonment expired, unless the creditors proceed to prosecute a commission, *i. e.* prefer a petition before that time expires.

The right to relief having attached according to the law of Congress, no subsequent act of the creditors can defeat or divest such right.

It is said, and admitted, that the debtor cannot make himself a bankrupt; and if he does not apply for relief under the insolvent laws, he will lie in gaol.

Such conduct would not benefit the debtor—it would not exempt his property from execution—and he would be suffering under the imprisonment, and therefore cannot be presumed.

Where two Courts have concurrent jurisdiction over the same subjects in contest, it may well be presumed that they will expound the law in the same way, and that the exposition given is the right one. But should they differ, there is no way of redressing the mischief resulting from such collision of opinion, but by resorting to a superior judicature who can control the judgments, and in that way redress the evil, and effect an uniformity of decision in future cases.

The Judge of the Court of the United States has not decided this case, and should this Court determine the one way or the other, it may possibly be contrary to his judgment, and therefore the reasoning, if applicable, would go to the precluding this Court from taking cognizance of the case.

The fifty-sixth section provides, that the commission, and the assignment of the commissions of the bankrupt's estate, shall be conclusive evidence that the debtor is a bankrupt.

2. In the trial of the issues, the plaintiff's counsel offered an agreement between a certain James Piercy, who was a sugar refiner in the City of Washington, and one Walter Hellen, by which the said Piercy agreed to give a certain per centage to Hellen for disposing of his refined sugars in Baltimore. This was countersigned by Ray, who had, as trustee for his wife, executed an agreement between himself and Piercy, by which he vested a large sum of money in the hands of Piercy, at a very high premium, which sum of **323** money, belonging to Ray's wife, Ray had agreed that Hellen should receive the per cent. fixed on by Piercy, and endorsed his agreement on the writing between Hellen and Piercy. This was not objected to, but was read to the jury. On the same paper was written a subsequent agreement between Hellen and Piercy, but not countersigned by Ray in the above manner. This was offered in evidence by the defendant's counsel, but objected to by the plaintiff's counsel.

THE COURT, however, admitted the evidence.

3. The plaintiff, by his counsel, having given evidence of the contract between Ray, as trustee for his wife, and Piercy, by which they meant to contend, from the largeness of the interest, that Ray was a trader, and the agreement fraudulent, and intended to prevent the partnership being known. The defendant's counsel then offered another deed between Ray and Piercy, in which it was recited that

Ray's wife had a large sum of money under the former deed in Piercy's hand. This was intended to counteract the idea of the former deed being fraudulent, and to shew that Ray was really a trustee, and not a partner. The witnesses to this deed were proved to be dead, and their hand-writing established. It was then objected to on the ground of the delivery not being proved, and also that it was giving Ray's own acts in evidence for himself, and that Piercy, the other party to the deed, was no party to these issues.

DUVALL, J. (CHASE, Ch. J. absent.) The delivery of every deed must be proved, as well as the execution of it—It is an essential requisite to the validity of every deed. As to the case of a bond the possession being with the obligee, it is sufficient evidence of a delivery. There is no evidence of the delivery in this case—and if there were, it would not be admitted, as it would be suffering the party to be benefited by giving his own acts in evidence in his own favor.

**324** \* *Martin*, (Attorney-General,) for the defendant, wished to take a bill of exceptions to the opinion of the Court.

DUVALL, J. A bill of exceptions cannot be signed in this case, being on the trial of issues from Chancery.

*Vide, contra—Brown et al. vs. Pye*, in this Court at May, 1789, where, on a trial of issues from Chancery, evidence was offered by the plaintiffs, which being admitted by the Court, the defendant excepted, and a bill of exceptions was signed by HANSON and GOLDSBOROUGH, JJ.

4. The jury empannelled and sworn to try the several issues sent from the Court of Chancery in this case, found as follow, to wit:

*First Issue.*—We find that James Ray was on the 3d day of January, 1801, residing within the United States, to wit, in Prince George's County, in the State of Maryland, using the trade of merchandise, by buying and selling in gross and by retail.

*Second Issue.*—We find that the said James Ray was arrested under a *capias ad satisfaciendum* issued against him out of the General Court for the Western Shore by James Barry, on the 8th day of January, 1801, and not before, he then using the trade of merchandise, by buying and selling in gross and by retail.

*Third Issue.*—We find that James Ray, so using the trade of merchandise, on the 31st day of July, 1801, was in the custody of the sheriff of Anne Arundel County in prison, under an execution of James Barry; and so being in custody, a writ of *capias ad satisfaciendum* was issued against the said James Ray, by Daniel Carroll of Duddington, on the said 31st of July, which on the same day was delivered unto the said sheriff, who on that day served the said *capias* on the said James Ray; that the said Ray was committed on

the said execution to the sheriff, by the General Court at October Term following, to wit, on the 20th day of the said month of October.

*Fourth Issue.*—We find that the said James Ray, being committed to he sheriff of Anne Arundel County under an execution at the suit of Daniel Carroll of \* Duddington, at October Term, 1801, remained in the custody of the said sheriff, in prison, **325** until the present time, and so continues: That the aforesaid execution was delivered to the sheriff on the 31st day of July, 1801, the said Ray then being in the custody of the sheriff aforesaid, under an execution of James Barry.

*Fifth Issue.*—We find that the said James Ray was not arrested for debt at the suit of the United States at any time before the 1st day of January, 1802.

*Sixth Issue.*—We find that the said James Ray did use the trade of merchandise, by buying and selling in gross and retail, between the commencement of the bankrupt law, and the arrest by James Barry; but we find there was no dealing in exchange at any time between the periods aforesaid.

*Seventh Issue.*—We find that a commission of bankruptcy issued on the 5th of November, 1801, under the bankrupt law of the United States, against the said James Ray.

*Eighth Issue.*—We find that the commission of bankruptcy which issued against James Ray on the 5th day of November, 1801, was superseded by Philip Barton Key, Esquire, Chief Justice of the Fourth Circuit of the United States, on the 22d day of February, 1802.

*Ninth Issue.*—We find that James Ray, on the 8th day of January, 1801, was arrested under an execution of James Barry against the said James Ray, and was on the same day committed to prison by the said sheriff of Prince George's County, where he remained, until on the said execution he was committed to the sheriff of Anne Arundel County at May Term, 1801; that the said James Ray, so being committed and in prison, a *capias ad satisfaciendum* issued against him by Daniel Carroll of Duddington, and was delivered unto the said sheriff of Anne Arundel County on the 31st day of July, in the year aforesaid; on which said *capias* the said sheriff, on the day last aforesaid, arrested the said James Ray; and the said Ray was, at October Term in the year last aforesaid, to wit, on the 20th day of October, 1801, committed to the said sheriff, and has remained in custody of the said sheriff \* until this time: that a commission of bankruptcy issued against the said James Ray on **326** the 5th day of November, 1801, which was superseded on the 22d day of February in the year following; and that a new commission issued against the said James Ray on the 10th day of March last, which is still depending.

RICH'D T. LOWNDES, Foreman.

THE COURT certified to the Chancellor as follows, viz.

The General Court, upon the above finding by the jury, are of opinion, that if a debtor, who comes within the purview of the Act of the United States, "to establish an uniform system of bankruptcy throughout the United States," is imprisoned for debt, or upon contract, for the space of three months, that in such case the act of bankruptcy being committed at the end of two months imprisonment, the creditors have only one month allowed them to prefer a petition after such act of bankruptcy committed, and if they omit to prefer one within that time, the said Act of the United States ceases to operate on the case of the debtor from the expiration of the three months, and he may avail himself of the Acts of insolvency of the State.

The General Court are also of opinion, that the debtor's right to relief under the insolvent Acts of the State, having attached, according to the law of the United States, no subsequent act of the creditors can defeat or divest such right.

JEREMIAH TOWNLEY CHASE.

G. DUVALL.

5. By the first section of the Act of Congress of the 4th of April, 1800, entitled, "An Act to establish an uniform System of Bankruptcy throughout the United States," it is enacted, "that from and after the first day of June next, if any merchant, or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer, shall, with intent unlawfully to delay or defraud his or her  
**327** \* creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered, or taken in execution, or shall secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make, or cause to be made any fraudulent conveyance of his or her lands or chattels, or make or admit any false or fraudulent security, or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months, or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to any Court of common law, shall not within two months after written notice thereof enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to 1,000 dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be

arrested, at or before the return day of the same, to be approved by the Judge of the district, or some Judge of the Court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt; *Provided*, that no person shall be liable to a commission of bankruptcy, if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed."

By the sixty-first section of the said Act, it is enacted, "that this Act shall not repeal or annul, or be construed to repeal or annul the laws of any State now in force, or which may be hereafter enacted for the relief of insolvent debtors, except so far as the \* same may respect persons, who are, or may be clearly within the purview of this Act, and whose debts shall amount in the cases specified in the second section thereof to the sums therein mentioned. And if any person within the purview of this Act shall be imprisoned for the space of three months, for any debt, or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this Act, such debtor may and shall be entitled to relief under any such laws for the relief of insolvent debtors, this Act notwithstanding."

Under the twelfth section of the Acts of Congress of the 13th of February, 1801, entitled, "An Act to provide for the more convenient organization of the Courts of the United States," the validity of a commission of bankruptcy taken out against the within mentioned James Ray, came on to be tried before the Circuit Court of the United States, held for the fourth circuit, at the City of Annapolis, at the time when the issues herein before mentioned were before the General Court; and after argument before the Circuit Court,

KEY, Ch. J. delivered the following opinion. After hearing and considering the arguments of counsel, I am of opinion, that a person who falls within the purview of the bankrupt law of the United States, after commitment of three months, cannot avail himself of the benefit of a State insolvent law, if the creditors of such person sue out a commission of bankruptcy against him within six months next succeeding the act of bankruptcy occasioned by his commitment.

The first section of the law of Congress gives to the creditors a period of six months to prosecute commissions of bankruptcy after the act of bankruptcy committed.

It is contended, that the sixty-first section must be taken into consideration with the first section, and that it operates as a restriction of the time in the special case of bankruptcy arising from imprisonment; and that but three months is allowed in this latter instance, it being in *favorem libertatis*.

**329** \* In sound construction the two sections must be taken together; and in my judgment they are consistent with each other, and the sixty-first section is not repugnant to, nor does it restrict or abridge the operation of the first.

No part of a law ought to be considered as a repeal or restriction of a former express provision in the same law, unless such construction be inevitable.

The subject of bankrupt laws early engaged the attention of this country; and to produce a system of uniformity with respect to merchants and traders, the Constitution of the United States took from the individual States all power on this subject, and gave it to the General Government. The States were left in possession of the power to pass insolvent laws. But as to the bankrupt system, when Congress legislated on that subject, the States ceased to have power except so far as that law gives it.

The first section, considering the extended situation of our country, and the relative situation of the several States, adopted a reasonable and wise limitation in point of time, viz. six months to prosecute a commission of bankruptcy; more time might have been oppressive to the debtor, less might have been injurious to the distant creditors. No man can make himself a bankrupt. Hence it is obvious, that if none of his creditors prosecuted a commission of bankruptcy, a debtor, against the principles of humanity and the general sentiment of this country, might be imprisoned for life; and this gave rise to the provisions of the sixty-first section.

But "it is necessary that this section should be so construed as to repeal the provisions of the first, *quoad* debtors lying in gaol three months."

I am of opinion it does not, and that the policy of this section was to compel the creditors to sue out a commission within the time prescribed, or if they did not, the debtor might avail himself of a State insolvent law. Congress did not legislate with a view to the local laws of any State. Some States have permanent insolvent laws,

**330** others have annual ones, but \* none of them admit a debtor to be finally liberated in less than three months proceedings and there is a great difference between imprisonment for life, and imprisonment until an annual session of a Legislature takes place next after creditors shall have for six months failed to prosecute a commission.

Under my ideas of the bankrupt law, if a debtor be imprisoned for three months, and no commission is sued out by his creditors, he may apply for the benefit of an insolvent law, and if the commission is not sued in six months, may have full benefit of the insolvent law; but if after his application, and within six months after the act of bankruptcy committed, his creditors sue out a commission, it draws the transaction from State cognizance to the forum, where the



Constitution and the law of Congress place it, and precludes State relief.

This construction gives efficacy and consistency to the first and sixty-first sections. It prevents the clashing of the General Government and State jurisdictions, and enables the debtor if he has acted honestly and fairly to have the full benefit of the bankrupt law.

If three months imprisonment, as has been contended, ousts the operation of the bankrupt law, remote creditors would be defeated of its provisions. All and every creditor is entitled to make his debtor (if a merchant or trader and committing an act of bankruptcy,) a bankrupt. Now a creditor cannot know that his debtor will remain in gaol two full months, and until that event takes place no act of bankruptcy is committed. If then the bankrupt law ceases to operate after an imprisonment of three months, then there is but one month allowed in Maine or Massachusetts to prosecute a commission of bankruptcy against his debtor in Savannah or the Natchez. Creditors in the neighborhood may do it, but as all are to have an equal right, I cannot lessen the express limitation of the first section by a forced construction of the sixty-first section.

Again—if at the end of three months imprisonment the bankrupt law ceases to operate on a debtor, it is \* against the express provisions of the first section, and precludes distant creditors, **331** in remote States, from making their debtors bankrupts, and draws their business into State Courts, and makes their property in debts liable to State regulations, against the Constitution of the United States, which gives to them Federal tribunals for the determination of their rights; a construction that draws these consequences must not be by implication; it should be imperative and unavoidable, which does not exist in this case.

These are the reasons which influence my opinion, drawn amidst the hurry of incessant engagements.

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## COURT OF APPEALS, JUNE TERM, 1802.

### CONTEE vs. FINDLEY *et al.*

It is within the discretion of the Court of Appeals to give interest by way of additional damages. (a)

On a judgment founded on a verdict for damages including interest, the Court of Appeals will permit interest to be calculated thereon from the date of the judgment until its affirmance in such Court, and award the same by way of additional damages.

**ERROR** to the General Court. The judgment in the Court below was for the defendants in error upon a verdict in an action of *assump-*

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(a) See Rev. Code, Art. 61, s. 124.

sit on an account stated. The verdict included the principal sum due, with interest calculated thereon to the time of the verdict.

The question here was, on affirming the judgment, whether there should be interest allowed, by way of damages, on the whole sum recovered in the General Court, from the date of the recovery to this time?

*Buchanan*, for the defendants in error, referred to *Hook vs. Boteler*, 3 H. & McH. 348; *Howard vs. Warfield*, 4 H. & McH. 21.

**332** \* *Key*, for the plaintiff in error.

RUMSEY, Ch. J. Said it was a mistaken idea that interest was always given by this Court as a matter of course. It is in their discretion, and they will allow interest, in the nature of damages, in such cases as they think it should be allowed.

In this case the Court direct the interest to be calculated on the whole sum recovered in the Court below, and award the same by way of additional damages.

#### COURT OF APPEALS, JUNE TERM, 1802.

ATTORNEY-GENERAL, at relation of GODMAN *vs.* SNOWDEN *et al.*

The contract of the Proprietary with a person taking up land under a proclamation warrant was nothing more than this: whatever land you shall survey under the warrant, without violating the rules of my land office, shall be patented to you, provided you shall pay me for it within two years from the date of the warrant.

Where a party holds land under a patent which, on proper application may be vacated, another party, who subsequently obtains a proclamation warrant and lays it on the same land, has no right to question such grant.

A proclinator of land does not stand, to all intents and purposes, in the place of the original taker of the land. He is not a party or privy to the original contract for the land.

A grant under a proclamation warrant does not relate to the original grant. On an application to chancery to vacate a grant of land on account of fraud, &c. if not for the benefit of the State, the vacating of it will depend on the equitable circumstances to be established in favor of the relator. (a)

APPEAL from a decree of the Court of Chancery dismissing the complainant's bill. As the decree states the nature of the question in controversy, it is deemed unnecessary to set out the bill and answers.

HANSON, C. (September 5th, 1799.) The first thing to be remarked is, that this is not an application for the benefit of the State to vacate

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(a) Cited in *Buckingham vs. Dorsey*, 1 Md. Ch. 82.

in the whole, or in part only, a grant fraudulently or improperly obtained by Seth Warfield. The application is merely for the benefit of the relator, Samuel Godman; and whether or-not he is to succeed is to depend on the equitable circumstances established in his favor.

That a proclinator of lands, to all intents and purposes, is to stand in the place of the original discoverer, and taker up, or of his assignee, is a position which appears to be wholly unfounded. Supposing that the taking out and executing a warrant of resurvey created a contract between the Proprietary and the owner of the warrant, on what principle is it, that the proclinator, who comes in on the failure \* of the said owner, and the total dissolution of that contract, **333** is to be considered as a party or privy thereto? What was in truth the nature of that contract, (if indeed it can be called a contract where only one of the parties is bound;) what is the nature of the contract to be ascertained, as it must be, from the warrant, the proclamation of the Proprietary, and the practice or usage of the land office? Whatever vacant land the owner of the warrant shall survey under the warrant, must be paid for at the established price, within two years after the warrant's date. The Proprietary shall otherwise be at liberty to grant it to the person who shall first apply; provided nevertheless, that if after the lapse of two years the said owner shall pay the price, before any application made by another person, the Proprietary shall still grant him the land.

It appears to the Chancellor strange, to suppose, that a person, who comes in for the express purpose of defeating the interest of the said owner, shall nevertheless be considered as a party, or privy to his contract, and entitled to every advantage which the said owner might claim. Was it ever before supposed that the man who makes a contract shall, by a failure on his part, absolve the other party, and that another person shall, notwithstanding, whose name was neither mentioned nor thought of as a party or privy, have the full benefit intended by the contract, and in total destruction of his right and interest? No. The contract of the Proprietary with a proclinator is nothing more than this—whatever land you shall survey under the warrant, without violating the rules of my office, shall be patented to you, provided you shall pay me for it within the limited time.

What then is the land in the present instance which Mr. Godman agreeably to those rules could survey under the warrant? It was all the vacant land comprehended in The Victory which was contiguous to the original, of which The Victory was a resurvey, together with any other vacant land which might be found contiguous thereto. What is to be deemed \* contiguous is not necessary to explain. **334** It is certain that no precedent can be adduced in favor of the complainant.

The Chancellor then may be considered as called upon to establish a precedent the consequences of which are obvious. If even the

State of Maryland were the real complainant in a suit to vacate a grant obtained on a survey made contrary to the rules of office, and against the interest of the State, the circumstances must be extraordinary indeed which would induce this Court to pass a decree which might thereafter be drawn into precedent, and which might shake the title of numerous honest purchasers. But supposing the grant to Seth Warfield to be such that this Court, on proper application, might vacate it, the Chancellor cannot consider the present complainant as the party entitled to apply. At the time of the grant he had no interest, and by his warrant he was entitled to no part of the land contained in the grant; and on no principle whatever can the warrant be considered to vest in him any right of action in this Court which the State might have to vacate the grant.

The Chancellor has proceeded so far on the supposition that the tract of land called The Warfields did not prevent the contiguity, which is essential to the complainant; and whether or not the said tract did prevent the said contiguity, he considers himself under no necessity of deciding. He has ever made it a point to determine nothing more than he conceived material to the cause; and besides, it is well known, that this tribunal rarely, if ever, undertakes to decide on questions of location.

Upon the whole, as it has been admitted by the parties, and as it appears that the great material question in this cause is, whether or not the grant of Warfield's Forest shall be vacated or corrected—Decreed, that the bill of the complainant, Samuel Godman, be dismissed. From which decree the complainant appealed to this Court.

**335** \* *Martin*, (Attorney-General.) *Ridgely*, and *Johnson*, for the appellant.

*Key*, and *Shaff*, for the appellees.

The Court of Appeals at this term affirmed the decree of the Court of Chancery.

#### GENERAL COURT, (E. S.) SEPT. TERM, 1802.

##### THOMPSON *et al.* Lessee vs. BROWN.

The following expressions in a grant of land, viz., "Beginning at a marked oak standing on the point and running N. E. 100 perches to another marked oak, standing by Hambleton's creek side, and running from the said oak E. a little northerly up the said creek, and branch 400 perches to a marked beech tree standing by the fresh run side." *Held*, by the General Court, that the last course should be a straight line, to be run from the oak to the beech; but reversed on appeal, by the Court of Appeals.

EJECTMENT for part of a tract of land called Anthrapp, lying in Queen Anne's County.

*Harper*, for the defendant, moved the Court to direct the jury that the following expressions in the grant of the tract of land called Anthrapp, to wit: "Beginning at a marked oak standing on the point, and running N. E. 100 perches to another marked oak standing by Hambleton's Creek side, and running from the said oak E. a little northerly up the said creek and branch 400 perches to a marked beech tree standing by the fresh run side," were not binding so as to carry the course along with the stream or creek, but the course intended was a straight line to the beech called for. That those expressions neither imported in themselves, nor were intended to confine the last course or line to the creek or run side, but were merely a description by which that line was to have the same general direction as the creek; that this construction was confirmed by the subsequent expressions of the same patent.

\* *Martin*, (Attorney-General,) for the plaintiff. The expressions in patents and certificates must be construed in a broad **336** and liberal sense for the benefit of the grantees: first, because surveyors in those times were generally men of little education, and cannot be supposed to have spoken and written with grammatical accuracy; there being numerous instances in which expressions equally loose in other patents have been fairly proved to bind on a water-course; secondly, because all grants are to be construed most favorably for the grantees.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurred.) The Court are of opinion, that it appears from the words themselves, independently of other expressions in the grant, that it was intended the course in question should be a straight line, and they therefore direct the jury, that the course must run from the oak to the beech, wherever, from the testimony, they may find the beech stood. The plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff appealed to the Court of Appeals.

\* *Martin* and *Hammond*, for the appellant.

*Bullitt* and *Scott*, for the appellee.

**337**

The Court of Appeals, [TILGHMAN, BUCHANAN and GANTT, JJ.] reversed the judgment of the General Court, at December Term, 1807, and awarded a *procedendo* to the County Court. (a)

(a) It is believed the Court of Appeals reversed the judgment of the General Court upon the ground that there was ambiguity in the expressions used in the grant, and that therefore the question should have been left to the decision of the jury. H. & J.

## GENERAL COURT, (E. S.) SEPT. TERM, 1802.

## PARKER'S Ex'rs vs. FASSITT'S Ex'rs.

Proof of the hand-writing of the witness to an instrument of writing, who is dead, is sufficient evidence of its execution, without proving the hand-writing of the party to it. (a)

The count for money had and received, can only be supported by proof of the actual receipt of money by the defendant. (b)

Where F. in January, 1796, got possession of property claimed by P. and in March, '96, P. brought trover against F. which action abated in the same year by the death of F. and no administration was granted on F's estate until January, 1799. and in February, '99, P's executors brought assumpsit against F's executors for the value of the property, it was held that the Statute of Limitations was not a bar to the suit. (c)

**ASSUMPSIT.** The declaration contained two counts; the 1st, for work and labor, and the 2d, for money had and received. The defendant pleaded the general issue, and the Act of Limitations.

1. The following statement was agreed upon, viz. That the brig *Lively*, Captain Lawrence, bound from Amsterdam to New York, was stranded on a beach in Worcester County some time in January, 1795. That the master and hands of said brig, at the time she was so stranded, said she was loaded with gin, and that it was so generally believed in the neighborhood. That Schoolfield Parker, the plaintiffs' testator, in the month of January, 1796, found on the beach shore, not more than two miles from the place where the said brig was stranded, seven pipes of gin almost buried in the sand, and the surf washing over them; that not having a sufficient number of people with him to remove the said gin to a place of safety, he wrote his name upon the pipes, and returned across *Sinepuxent Bay* to the main land to procure assistance. That he returned on the same day with a sufficient number of people to remove the gin; but when he arrived, he found John Fassitt, the defendant's testator, with a number of others, engaged in taking the gin out of the sand and surf to a place of safety. That upon Parker's attempting to interfere and take \* the gin into his possession, Fassitt forbid him, **338** and prevented him from interfering in any manner with it. That Parker, on the 15th of February, 1796, demanded the gin of

(a) See Code, Art. 37, s. 6, (Rev. Code, Art. 70, s. 7:) *Handy vs. State*, 7 H. & J. 42; *Dorsey vs. Smith*, *Ib.* 345; *Pannell vs. Williams*, 8 G. & J. 511; *Edelen vs. Gough*, 5 G. 103; *Keefer vs. Zimmerman*, 22 Md. 274; *Eichelberger vs. Sifford*, 27 Md. 320.

(b) But see *Shanks vs. Dent*, 8 G. 120; *R. R. Co. vs. Faunce*, 6 G. 68.

(c) As to the suspension of the Act of Limitations when no administration has been granted, see *Haslett vs. Glenn*, 7 H. & J. 17; *Fishwick vs. Sewell*, 4 H. & J. 393; *Stewart vs. Carr*, 6 Gill, 430; *Young vs. Mackall*, 4 Md. 362; *Stewart vs. Spedden*, 5 Md. 433; *Donaldson vs. Raborg*, 26 Md. 312.

Fassitt again, but he refused to deliver it to him. That it was nearly a year after the said brig was stranded before any gin was found on the shore near the place where she was stranded. That 29 pipes of gin, including the above seven, were all that was found near the place where the brig was stranded, and that Fassitt had them all in his possession, and paid the duties on them. That Parker, in his life-time, instituted an action of trover on the 23d of March, 1796, against Fassitt in his life-time, for the said seven pipes; that the said action abated at September Term General Court, 1798, by the death of Fassitt, and that from that time till the 8th of January, 1799, there were no letters testamentary taken on Fassitt's estate, and that the present suit was brought on the 4th of February, 1799.

A paper, purporting to be a power of attorney from Lawrence, the master of the brig, to John Fassitt, to save, take care of, and sue for, all property which had come out of the said brig, and which might be in the possession of any person, dated the 12th of February, 1795, and witnessed by one John Rackliffe, (now dead,) was then produced; and a witness sworn to prove Rackliffe's hand-writing.

*Bayly*, for the defendants, then offered to read the same as evidence to the jury; but

*Harper*, for the plaintiffs, objected—that Lawrence's hand-writing must first be proved. He insisted that proof of the hand-writing of a witness to any instrument of writing was not sufficient proof of its execution, but that the hand-writing of the person by whom it purports to have been given, must also be proved in some one or other of the modes pointed out by law. He contended, that the most dangerous consequences would result to society if this were sufficient proof of the execution of an instrument, as nothing would be more easy than to forge any instrument, sign any person's name to it, prove the hand-writing of the witnesses, and charge the party, or his representatives, with all the legal consequences of such an instrument. **339**

THE COURT decided, that proof of the hand-writing of the subscribing witness to the instrument was sufficient proof of its execution. (a)

2. *Harper*, and *Whittington*, then moved the Court to direct the jury, that if they should find that the plaintiffs had a right to the gin, it was sufficient to charge the defendants on the second count,

(a) The circumstances of Laurence being a sea-faring man, and only by accident thrown upon the coast, and that he would probably never again be within the jurisdiction of the Court, and the difficulty of discovering where he might be found, for the purpose of issuing a commission to take his deposition, had probably some weight with the Court. This being the best evidence of which the nature of the case would ordinarily admit. H. & J.

if their testator had converted the gin to his own use, whether he had ever sold it or received any money for it or not.

THE COURT refused to give this direction, and said, that to support an action for money had and received, there must be proof of the actual receipt of money.

3. *Bayly*, then moved the Court to direct the jury, that according to the statement of facts in the case, the plaintiffs' claim was barred by the Act of Limitations.

THE COURT refused to give the said direction. They said, that limitations did not affect the case according to the statement of facts agreed upon.

Verdict for the defendants.

### 340 \* GENERAL COURT, OCTOBER TERM, 1802.

#### CUMMINGS *vs.* THE STATE.

Where goods are stolen out of this State and are brought by the thief into the State, the offence is cognizable by the Courts of this State. (a)

Whether a writ of error will lie in a criminal case. (b)

A writ of error must be directed to the inferior Court by its proper style.

A writ of error quashed because it was not produced to, and allowed by, the inferior Court until after the return day of the writ.

WRIT OF ERROR, issued on the 7th of October, 1802, directed "To the Worshipful Justices of the Criminal Court of Baltimore County," for the removal of a criminal prosecution to the General Court, and returnable on the second Tuesday of the said month of October. The record as transmitted states, that the writ of error was on the 14th of October, 1802, produced, and according to the Act of Assembly in such case made and provided, a record, &c. is transmitted, &c. By the record it appears, that Cummings, was, "at a Court of oyer and terminer and gaol delivery for Baltimore County," held in the City of Baltimore on the second Monday in July, 1802, indicted for and convicted of stealing a black mare, &c. and was sentenced by the Court to work on the public roads two years and three months.

(a) In *Worthington vs. State*, 58 Md. 408, it was held that when a person steals goods in another State, and brings them into this, the person stealing cannot be indicted and punished here for the crime committed in the former State; but the act of bringing such stolen goods into this State is a new larceny, for which the party may be indicted in the Courts of this State and punished. The Court said that *Cummings vs. State*, had left the question an open one.

(b) See *State vs. Buchanan*, 5 H. & J. 317; *Rev. Code*, Art. 71, secs. 37, 38; *Neff vs. State*, 57 Md. 395; *State vs. McNally*, 55 Md. 559.



The verdict of the jury was subject to the opinion of the Court on the following facts: That John Cummings, the prisoner, on the 8th of May, 1802, in the County of Chester, in the State of Pennsylvania, with force and arms feloniously stole, took and carried away, a black mare of the value of 20*l.* 5*s.* 0*d.* current money of Maryland, of the goods and chattels of Richard McIlvain. That the said John Cummings on the 10th of May, in the said year, feloniously brought the said mare to Baltimore County in the State of Maryland; and the said Cummings, on the 11th of May in the said year, was arrested for the said felony at Baltimore County aforesaid. And if the Court shall be of opinion, on the matter aforesaid, that this Court hath jurisdiction to hear and determine on the felony aforesaid, then judgment to be given for the State; and if the Court shall be of opinion that it has not jurisdiction in the aforesaid case, then judgment to be given for the prisoner; and on this statement it is agreed that a writ of error may be brought upon the judgment as if these facts had been found on a special verdict.

\* The Court of Oyer and Terminer, &c. gave judgment upon the case stated for the State; and the prisoner brought a writ of error. The record of proceedings was certified and attested by the clerk in the usual manner of attesting proceedings in civil proceedings. **341**

*Martin*, (Attorney-General,) moved to quash the writ of error, and the return thereto. He contended that there was no legal return of the record—the transcript not being signed by the justice of the Court. That it had never been decided that a criminal proceeding could be removed by writ of error: That if the writ lies, it has not been directed to the proper Court, for there is no such Court as the Criminal Court, &c.

*Harper*, for the plaintiff in error, cited the cases removed by the Attorney-General himself, at the suit of the State, which had been by writs of error, and said that the practice had been in all cases of removals, to transmit the record under the hand of the clerk and seal of the Court. *Negro Peter vs. The State*, 4 *Harr. & McHen.* 3; *Barnes vs. The State*, affirmed at October Term, 1797; *Harrison vs. The State*, reversed at October, 1794; *Power vs. The State*, removed by writ of error, and reversed at October, 1793.

CHASE, Ch. J. cited the cases of *Jenifer vs. The Lord Proprietary*, at September Term, 1774, and *Gale vs. Lord Proprietary*, at April Term, 1772, where the question had been argued, that an appeal would not lie in a criminal case; but he did not know that the point was decided by the Court.

*Harper* moved for and obtained a writ of diminution to the Court below, for the purpose of getting the \* Justices to cer- **344**

tify the record; and on the 12th of November, a record was returned, certified by the Justices of the Court.

But as the return day of the writ of error had elapsed before said writ was presented to, and allowed by the Court.

The General Court quashed the writ of error.

## GENERAL COURT, OCTOBER TERM, 1802.

### JENINGS' Adm'r vs. HIGGINS.

A master, in order to retain the services of his slave who has petitioned for his freedom, must enter into the usual recognizance for suffering the petitioner to prosecute his petition, &c.

If a petitioner for freedom obtains a judgment in his favor, which is afterwards reversed on appeal, his master cannot recover the value of his services from a person who may have hired him between the time of the first judgment, and that of its being reversed, unless he has given bond to prosecute the appeal.

And if he does give such bond it seems he will have a right to keep such petitioner in his possession pending the appeal.

**ERROR** to Anne Arundel County Court. It was an action of *assumpsit* for work and labor performed, &c. by a servant man of the defendant in error, called Nathan Allen, for the intestate, and at his request, &c. The general issue pleaded. At the trial in the County Court, the plaintiff in that Court, (Higgins,) offered evidence to the jury that a certain negro Nathan, whom he claimed as his slave, left his service in December, 1794, and went into the service of the defendants' intestate, (Jenings,) and remained in the service of the said intestate while he made two crops, and that the plaintiff, in December, came and claimed him as a slave, and took him out of the possession of the defendant's intestate into his own possession. The defendant then offered in evidence to the jury, the record and proceedings of a judgment rendered in Anne Arundel County Court, in September, 1794, on the petition of the said Nathan Allen, against the plaintiff, claiming his right to freedom, and the judgment of the said Court thereon, that the said Nathan Allen was entitled to his freedom, and that he be discharged from the service of the said Higgins. The defendant also offered to prove, that immediately after the judgment given in favor of the said petitioner, in the said record of proceedings mentioned, to wit, in the month of December, 1794, the said negro Nathan left the service of the said Higgins and went into the service of the defendant's intestate, and not before. The plaintiff then offered \* to prove by J. C. Higgins,  
**345** that he, the witness, was the manager of the business of the plaintiff, and that he had had the management and direction of this negro Nathan together with the other negroes of the plaintiff. That the said Nathan was not permitted by the plaintiff to hire

himself to the defendant's intestate, or to any other person, and that the said witness did not, nor did any other person demand the possession of the said negro from the defendant's intestate, or claim any compensation for his hire, until the month of November, 1796, when the witness, as directed by the plaintiff, claimed and took possession of said negro as before mentioned. He also offered evidence that the judgment of the County Court of Anne Arundel on the said negro Nathan's petition for freedom, was afterwards, at October Term, 1796, reversed by the General Court, and the judgment of the General Court was affirmed by the Court of Appeals at June Term, 1798.

The defendant then prayed the Court to direct the jury, that if upon the foregoing evidence, the jury were of opinion that said negro was in the possession of Thomas Jenings, the intestate, from the time of the judgment aforesaid in Anne Arundel County Court in favor of said negro, the petitioner, until the same was reversed in the General Court as above stated, that then the plaintiff was not entitled to recover in this action, unless the jury were also of opinion that the said negro was expressly hired to the said intestate by the plaintiff, or unless he went into the service of the intestate with the previous consent of the plaintiff, or of some one acting by his authority, and intending to claim compensation for his services during the said time.

But the County Court, (RIDGELY, Ch. J.) refused to give such direction, but was of opinion, and so directed the jury, that if they should be of opinion that said negro was hired by the defendant's intestate after the rendition of the judgment in the County Court, and during the time the same remained unreversed,\* and that the said negro had not himself received the wages of such **346** hire before said reversal, that the plaintiff was entitled to recover them in this form of action. But that if the jury should be of opinion that the said wages were paid to the said negro before the reversal of the said judgment, that then the plaintiff in this form of action could not recover. To which opinion, the defendant excepted. And the verdict and judgment being for the plaintiff, the defendant obtained a writ of error, and removed the proceedings to this Court.

*Shaff and Jenings*, for the plaintiff in error.

*Ridgely and Johnson*, for the defendant in error.

The General Court reversed the judgment of the County Court—observing, that upon the appearance of the master to a petition for freedom by his slave, in order to retain the services of the petitioner, he must enter into a recognizance in the usual form, for suffering the petitioner to prosecute his petition, to use him well, &c. and that if judgment be given for the petitioner, and the master appeals, he must, to retain the service of the petitioner, enter into bond with security, to prosecute the appeal—neither of which in this case was

done, as appears by the record of the proceedings exhibited in the bill of exceptions.

GENERAL COURT, OCTOBER TERM, 1802.

BEALL'S Lessee *vs.* BEALL.

Relation of a grant to the certificate of survey, so as to overreach a prior grant for the same land, refused, the certificate not having been returned, nor the composition paid within the time limited by the rules of the land office.

EJECTMENT for a tract of land called Greenland, lying in Prince George's County. The defendant took defence on the plots for a tract of land called Chance Enlarged.

Plaintiff's title. James Beall, the lessor of the plaintiff, on the second of April, 1766, obtained a warrant of resurvey upon a tract of land called Bear Garden Enlarged, otherwise called Adventure, which not being executed, was renewed on \* the 29th of September, **347** 1766, and on the 28th of March, 1767, a certificate was returned; on the 5th of October, 1768, the composition money was paid, and a patent issued for the said land called Greenland on the 29th September, 1768, to the said James Beall.

Defendant's title. John Beall of Robert, under whom the defendant claimed, on the 12th of March, 1766, obtained a warrant of resurvey upon a tract of land called Chance. The warrant not being executed, was renewed on the 11th September, 1766, and again renewed on the 2d March, 1767. John Beall, of Robert, dying, the warrant was renewed on the 20th of April, 1767, in the name of Shadrach Beall, son of John. On the 19th December, 1767, a certificate was returned for Chance Enlarged. On the 2d of April, 1768, the composition money was paid, and a patent issued the 12th July, 1768, to the said Shadrach Beall.

The question in this case was, which patent had the preference? Which was argued by *Mason*, for the plaintiff, and by *Shaafl*, for the defendant.

**348** \* CHASE, Ch. J. The Court are of opinion in this case, that the patent to James Beall cannot relate to the certificate so as to overreach the prior grant to Shadrach Beall, son of John. Relation is a fiction of law, grounded on a principle of equity—and in this case the equitable interest of James Beall ceased and was extinct after the 2d of April, 1768, he not having returned his certificate, nor paid the composition money within the time limited by the rules of the land office, being within two years from the date of the warrant; and after that time the Proprietary was at liberty to grant the

land to any applicant; and Shadrach Beall fairly and honestly acquired a legal title to the land in question, by his grant on the 12th of July, 1768, which is prior to the grant of James Beall, the lessor of the plaintiff.

The plaintiff non-suited.

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\* GENERAL COURT, OCTOBER TERM, 1802. **349**

WEBB'S Lessee *vs.* BEARD.

If the surveyor at the time of surveying a junior tract of land, run the elder adjoining tracts without regard to the calls therein, or correcting the variation, then to ascertain the beginning of the junior tract at any future period, the elder tracts must be run without regard to the calls therein, or any allowance for variation. (a)

Parol evidence is not admissible to prove that the surveyor never did actually run out or survey the land included in a certificate of survey returned by him, until after a grant had issued thereon. (b)

EJECTMENT for a tract of land called Hawn's Venture, lying in Washington County.

1. The defendant took defence for the tract called Gleanings, as he had located it on the plots, which included the whole of the tract of land called Hawn's Venture. The tract called Gleanings was surveyed for Samuel Chase and Thomas Johnson, Esquires, on the 7th of February, 1764, "beginning at a bounded white oak standing at or near the end of 56 perches on the 48th line of The Resurvey on Lime Stone Land, also near the end of 13 perches on the 25th line of The Resurvey on Scar'd from Home, and running thence N. 76, E. 162 perches," &c. The tracts called The Resurvey on Lime Stone Land, and The Resurvey on Scar'd from Home, contained a number of calls in the certificates, and if they were now located calling for the boundaries, and where there were no calls, with an allowance of one degree for every twenty years, since the dates of the certificates, for variation, then Hawn's Venture would not interfere with, but lay clear of Gleanings; but if the calls were rejected, and no allowance made for variation, then Hawn's Venture, being a junior tract, would lay within and be covered by Gleanings.

The Court [CHASE, Ch. J. and DUVAL, J.] determined, that if the surveyor at the time of surveying the tract of land called Gleanings, run the tracts of land called The Resurvey on Lime Stone Land, and The Resurvey on Scar'd from Home, without regard to the calls

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(a) Examined in *Green vs. McClellan*, 4 H. & J. 206; Cf. *Tenant vs. Hambleton*, 3 H. & J. 233.

(b) See *Hammond vs. Norris*, 2 H. & J. 132.

or correcting the variation, then to ascertain the beginning of the tract of land called Gleanings, the above mentioned tracts must be run without regard to the calls in the certificates or any allowance for variation.

2. The plaintiff then offered parol evidence to prove that the surveyor of the county, to whom the warrant was directed for taking up and surveying the tract called Gleanings, never did actually run out or survey \* it until about two years after the certificate and **350** plot for the same were made out by him and returned to the land office, and after the grant had issued thereon.

THE COURT refused to permit such evidence to go to the jury. The plaintiff suffered a non-suit.

*Key* and *Shaaff*, for the plaintiff.

*Martin*, (Attorney-General,) *Mason* and *Johnson*, for the defendant.

## GENERAL COURT, OCTOBER TERM, 1802.

### PANCOAST'S Lessee *vs.* ADDISON.

The Statute of 21 James I. ch. 16, has been adopted by the Courts of Maryland as applicable, &c.

The words "beyond seas," in the saving of the Statute of 21 James I. ch. 16, are synonymous with out of the jurisdiction of the State. (a)

A non-resident of the State, but who is a resident of one of the United States, is not barred by the Statute of Limitations in an action of ejectment.

The Statute of 32 Henry VIII, ch. 2, s. 2, respecting dormant titles, does not extend to this State, nor has it been adopted or introduced therein by any decision.

The general reputation and tradition in a family of the death of one of its members, and of his having died seized of real estate, is evidence of those facts, even in an action of ejectment for such estate by another of the same family claiming under the deceased.

The deposition of a witness that she had heard her father, and others of the family, now dead, say that her grandfather and his brother had emigrated from England: that before they emigrated, their younger brother, who was an apprentice, had been kidnapped in London and brought to Maryland, and that he had been sold by the captain of the vessel to some gentleman in Maryland, &c. was *held* to be admissible in evidence to prove relationship, as part of a chain of evidence.

Hearsay, derived from a person who was then heir at law, and claimed the land for which the ejectment is brought, admitted as legal and competent evidence for the plaintiff in such action to prove pedigree, descent, &c. (b)

(a) So held in *Brent vs. Tasker*, 1 H. & McH. 59.

(b) See *Cope vs. Pearce*, 7 G. 263.

**EJECTMENT** for a tract of land called Pencott's Invention, otherwise called Pencost's Invention, lying in Prince George's County. The defendant took defence on the plots made and returned in the cause, for a tract of land called The Discovery, and a tract of land called Gisborough Manor. He also located his possession of the said tracts by actual enclosures made in 1772, and continued to the present time.

1. The plaintiff at the trial gave in evidence a grant to James Pencott, dated the 1st of October, 1687, for the tract of land mentioned in the declaration called Pencott's Invention. He also gave in evidence that the said James Pencott, the grantee, died before the year 1734, in the Province of Maryland, intestate, seised of the said land; that at the time of his death, his brother William, his heir at law, was residing in the Province of New Jersey; that the said William, and his heirs, (the heirs of the said grantee,) resided from that time, until within six years past, in the Province and State of New Jersey; that they, nor either of them, had ever come within the Province or State of Maryland in the intermediate time; that the lessor of the plaintiff is, and was at the time when this suit was instituted, the heir at law of the said grantee, and first came into the State of Maryland within six years past.

\* The defendant prayed the opinion of the Court, and their direction to the jury, that if they are satisfied that the lessor **351** of the plaintiff is heir at law of James Pencott, the patentee; that the said patentee died before the year 1734, leaving his brother his heir at law, at that time of full age residing in the then Province now State of New Jersey, and one of the United States of North America, and that the said heir at law is since dead, leaving the father of the lessor of the plaintiff of full age, his heir at law, and that afterwards the father of the lessor of the plaintiff died in 1759, leaving the lessor of the plaintiff, at that time an infant, his heir at law, and that neither the lessor of the plaintiff, nor his ancestors, did at any time between the year 1734 and 1798, make entry upon or hold any possession of the land in the declaration in this cause mentioned; and if they further find that the said land was escheated in the year 1734, and patented to Lewis Wilcoxon, and that afterwards the said Wilcoxon in the year 1738, for a valuable consideration, sold the same to Thomas Addison, and that the same, by regular mesne conveyances, came into the possession of the defendant, and that the defendant, and those under whom he claims, ever since the year 1734 down to the present time, have by themselves and their tenants been in the actual possession, use, and enjoyment of the said land, and have paid quit-rents for the same from the year 1734 to the year 1775, and have paid taxes and assessments for the same to the State of Maryland from the year 1775 to this time, that then the lessor of the plaintiff cannot recover in this suit, notwithstanding the heirs of the said patentee had always resided in the said Province and

State of New Jersey, and had been absent out of the Province and State of Maryland as aforesaid.

**352** The question raised was opened and argued by \* *Key, Shaff* and *Mason*, for the defendant. They cited and relied on the statute 21 *Jac. I*, ch. 16; 3 *Bac. Ab.* 5, 3; *Stat. 32 Hen. VIII*, ch. 2, s. 2, 8; *King vs. Walker*, 1 *Blk. Rep.* 286; *Ward vs. Hallam*, 2 *Dall. Rep.* 217; *Show. Rep.* 523; 3 *Inst.* 140; 3 *Blk. Com.* 167, 178, 196, 353, 354; *Statute 13 Edw. I*, ch. 1; *Roll. Ab.* 11, 12; 2 *Harr. and McHen.* 401; 2 *Mod. Ent.* 319; 1 *Saund.* 36, 37; *Hat.* 109; *Cro. Car.* 513; 2 *Inst.* 383; 1 *Bac. Ab.* 310, 311; *Roll. Ab.* 358; 2 *Salk.* 483, 484.

*Martin*, (Attorney-General,) and *Gantt* for the plaintiff. They cited and relied on *Cruise on Fines*, 77, 79; *Stat. 3 Edw. I*, ch. 44; 18 *Educ. I*, *Stat.* 4, ch. 1; 1 *Rich. III*, ch. 7, s. 6; *Co. Litt.* 244 a; 1 *Blk. Com.* 93, 109, 110, 457; *Stat. 4 Hen. VII*, ch. 24; *Plow.* 368, 376; 1 *Dall. Rep.* 15, 67; 10 *Vin. Ab.* 160, pl. 7, tit. *Essoign*; 2 *Inst.* 253; *Stat.* 13, *Educ. I*, *Stat.* 2; *West.* 2, ch. 2, s. 3; 4 *Vin. Ab.* 217; 39 *Educ. III*; *Jacob's Law Dict.* tit. *Navy*; Act of 1715, ch. 23, s. 3; 1 *Harr. & McHen.* 28, 30, 84, 89; *Plow.* 360, 363; 3 *Harr. & McHen.* 122; *Dyer*; 8 *Rich. II*; *Co. Litt.* 107, sec. 157, and (note 115); 260, sec. 439; *Showers' Rep.* 91; *Holt's Rep.* 426; *Vaugh. Rep.* 300; 10 *Vin. Ab.* 161, pl. 67 (note); *Jenk. Rep.* 10, pl. 18; *Atk.* 614; 3 *Blk. Com.* 177; *Stat.* 11 *Educ. III*, ch. 3; 25 *Educ. III*, ch. 2; 12 *Rich. II*, ch. 8; 13 *Hen. IV*, ch. 6; 3 *Hen. VI*, ch. 2; 3 *Educ. IV*, ch. 4; 4 *Educ. IV*, ch. 1; 3 *Hen. VII*, ch. 7; 7 *Hen. VII*, ch. 2; 11 *Hen. VII*, ch. 27; 12 *Hen. VII*, ch. 6; 19 *Hen. VII*, ch. 5; *Roll. Ab.* 358; 1 *Bac. Ab.* 310, tit. *Bastardy*; 1 *Ld. Raym.* 395; 1 *Salk.* 122; 2 *Salk.* 483; 2 *Stra.* 925; *Co. Litt.* 356, sec. 677; 3 *Bac. Ab.* 302; *Brac.* 276; 1 *Wils.* 134.

CHASE, Ch. J. (DONE, J. concurred. DUVAL, J. gave no opinion.) The question before the Court is, whether a person residing out of the State is within the saving of the statute of 21 James I, ch. 16?

It is admitted that this question has not been decided by the Courts of Maryland. If it has undergone a judicial decision, such decision has not been referred to.

The importance of this question has induced the counsel to go into a very full and elaborate discussion of it, and great ingenuity has been displayed in raising and obviating the difficulties which have been suggested to the Court.

The clause of the statute which relates to the case is in the following words: "That no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same, and in default thereof such

**353** person so not \* entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding; provided



nevertheless, that if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, or shall be, at the time of the said right or title, first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this Act; so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years."

This statute has been adopted by the Courts of Maryland as applicable to our situation.

To ascertain the meaning of the words "beyond the seas," and to shew in what sense they have been understood by the Judges of England, the Parliament and law writers, the common law of England, Acts of Parliament, and adjudged cases, have been referred to.

It appears to me, upon the best consideration I have been able to give the able and diffusive arguments of the counsel, and the authorities cited, that "beyond the four seas," "beyond the seas," and "out of the realm," are synonymous, and mean precisely the same thing.

Prior to the union of the two crowns of England and Scotland, on the accession of James the 1st, the words "beyond the four seas," "beyond the seas," and "out of the realm," meant and signified out of the limits of the realm of England. After the union of the two crowns, and at the time the Act of Parliament under consideration passed, the above words meant out \* of the realm of Great Britain, including England and Scotland. **354**

This explanation of the words, according to my judgment, will serve or go a great way in solving the difficulties which have occurred in the discussion of the question.

In the case of bastardy, according to the common law of England, if the baron was within the four seas from the time of the conception to the birth, the child was legitimate, access being presumed, unless the baron, from imbecility or some bodily infirmity, was incapable of getting a child. The late decisions allow of proof of non access to bastardize the issue, and so is the law established.

According to my judgment, if the baron was in Ireland, from the time of the conception to the birth, the issue would be a bastard; Ireland being a distinct realm and not within the four seas or realm of England.

The case in *Rolle's Abr.* 358, which seems to be the puzzle peg, is either to be reconciled in the following manner, or is overruled in

*Rex vs. Alberton*, in 1 *Lord Raymond*, 395, to which case Lord Baron Gilbert, in *Bac. Ab.* 310, refers.

The case in *Rolle* is, if the husband is in Ireland while the wife goes with child, such child is not a bastard; the reason added is what occasions the doubt, because he is within the king's dominions.

If a special verdict had found, that the baron was in Cadiz while the wife was going with child, the decision would have been the same, because the husband must be beyond the four seas at the conception, and at the birth, as well as during the pregnancy; and on the above finding in *Rolle*, the Court could not adjudge the issue to be illegitimate.

In *Raymond* the Court decided he is a bastard who is begotten and born of a *feme covert* while her husband is beyond the four seas. But independent of this, I think a person residing out of the State of Maryland, is within the saving of the Act of Parliament, as adopted by Maryland. This opinion, I trust is according to the true construction of the Act, of the \* decision in 1 *Blk. Rep.* 286, **355** *King vs. Walker*, and consonant to the principles of justice.

The second section of the Act is in the following words: "Provided nevertheless, That if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come, or fallen, without the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this Act; so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years."

The concluding words "coming into this realm," point out the meaning of the Parliament. They stand in opposition to "beyond the seas," and indicate plainly the intention of the Legislature was to comprehend all persons within the saving who were out of the realm of Great Britain; and in that manner was the Act of Parliament understood by the judge in *King vs. Walker*, in 1 *Blk. Rep.* 286; which I think can be plainly understood.

Mr. Justice Dennison says, "he must be beyond the seas—that is the old and true expression," to signify being out of the realm. The common law expression was beyond the four seas; but beyond the seas, and beyond the four seas, in the language of the laws of England, meant the same thing.

Mr. Justice Wilmot says, "there is no such kingdom as England now, the plaintiff therefore while in Scotland was not out of this realm"—the realm of Great Britain.

With reference to England before the union, Scotland, although not actually beyond the seas, was considered as beyond the seas because out of the realm.

\* The situation of England and Scotland before the union, was similar or nearly so to the actual situation of Maryland and Pennsylvania. The latter were separated by an ideal or mathematical line—the former were different realms or sovereignties—governed by different laws. **356**

Scotland, before the union, was beyond the seas in legal contemplation, although with England it was encompassed by the four seas—Why? because it was out of the realm of England.

The adoption of the statute in this State is the same as re-enacting it. The Statute of Limitations with the savings, is a beneficial law for the purpose of quieting possessions, &c. but without the savings it would be a rigorous and unjust law. It does not extend to persons out of the State who cannot be supposed to know the laws.

The Court are of opinion, that the lessor of the plaintiff is within the saving of the statute of 21 James I, ch. 16—and that the statute of the 32 Henry VIII, ch. 2, s. 2, does not extend to the State of Maryland, the Court not knowing of any judicial decision by which the same has been adopted and introduced into this State as the law thereof. The defendant excepted.

2. The plaintiff then offered to read in evidence to the jury the deposition of Mary Hewes, the daughter of William Pancoast, who was the father of Caleb Pancoast, who was the father of William Pancoast, the lessor of the plaintiff. The defendant's counsel objected to the reading of that part of the deposition contained in the following words, as incompetent and inadmissible testimony, viz. "That the land lay in Maryland between Belle Haven and Georgetown; that some time after the death of the brother in Maryland, the family in The Jersey were informed of his death, and that he died without a will. He died a bachelor; and it was generally reputed in the family that the land he died possessed of was held by the family in which he had lived as aforesaid. This knowledge this deponent gained in Jersey, and \* it was the common talk, reputation, and tradition in the family." **357**

But the Court, [CHASE, Ch. J. DUVALL and DONE, JJ.] overruled the objection, and admitted that part of the said deposition to be read to the jury. The defendant excepted.

3. The defendant then objected to the reading in evidence of that other part of the deposition of Mary Hewes, which is in these words: "She has heard her father, and others of the family, now dead, say, that her grandfather, and Joseph Pancoast his brother, emigrated from England; that before they emigrated they had a younger brother who had been bound apprentice to a mechanic; and as well

as she recollects, to a watchmaker in London; that this brother was kidnapped from London, and brought to Maryland, and sold by the captain of the vessel to some gentleman in Maryland," &c.

But the Court, [CHASE, Ch. J. DUVALL, and DONE, JJ.] overruled the said objection, and admitted that part of the said deposition to be also read in evidence to the jury. The defendant excepted.

4. The plaintiff then offered in evidence the testimony of Edward Pancoast, taken under a commission which issued in this cause. The defendant then offered evidence to prove that the said Edward Pancoast, was the son of William Pancoast, who was grandfather of the lessor of the plaintiff, and under whom the lessor of the plaintiff deduced title to the land mentioned in the declaration as heir at law. He objected to the reading in evidence to the jury the answers of the said Edward Pancoast, to the 5th, 6th, 7th, 8th, and 9th interrogatories, put to him under the said commission, on the ground that the said William Pancoast, from whom the witness derived his information, was interested; and he offered to prove that the said William Pancoast, at the time he gave the said information, was heir at law, and claimed title to the land in the declaration mentioned, and for \* which this suit is brought. Which said in-  
**358** terrogatories and answers are as follows:

*"Fifth Interrogatory.*—Did you know, or have you ever heard or been informed, and how and by whom, of one William Pancoast, the eldest, formerly of Burlington County, Jersey; if yea—then was he a native of America, or of what country was he a native; had he any brothers and sisters; if yea, what were their names, where did they live, when did they die; did they leave any issue, and what issue did they leave?"

*Answer.*—"That he neither knew, or ever heard of any William Pancoast older than William Pancoast, the great grandfather of William Pancoast the plaintiff; but that the great great grandfather of William Pancoast, the plaintiff, and the great grandfather of this affirmant, was named John Pancoast, who, as this affirmant has been informed by his father, originally came from England, and settled in the township of Mansfield, in the County of Burlington, in the State of New Jersey, and that he was a native of England, and that the said John Pancoast had no brothers or sisters, as this affirmant ever heard of, but that he brought with him two sons, William and Joseph; that he had a third son by the name of James, who was kidnapped in England, brought to Maryland in America, and sold, as this affirmant hath been given to understand by his father."

*Sixth Interrogatory.*—The same, with respect to James Pancoast, as the 5th respecting William.

*Answer.*—"That he hath been informed by his father, that James Pancoast mentioned in his answer, to the 5th interrogatory, was a

native of England; that he bought a tract of land and settled in Maryland, on the Potomak; that he came afterwards to see his brothers William and Joseph, in New Jersey; that he concluded to sell his lands in Maryland, and come and live in New Jersey; that he returned to Maryland, and was afterwards drowned in the river Potomak, as this affirmant hath been given to understand by his father; that he never heard of his having any heirs but his two brothers William and Joseph."

\* *Seventh Interrogatory*.—"Do you know, or have you ever been informed, and how or by whom, of the Pancoast family; **359** if yea, from what country did they emigrate to this; where did the first emigrants of that family settle in America, and who are the descendants of that family? Relate as fully as you can."

*Answer*.—"That he has been informed by his father, that the Pancoast family emigrated from England to America; that the first emigrants settled in the township of Mansfield, in the County of Burlington, in the State of New Jersey, except James Pancoast, who settled in Maryland, as mentioned in the answer to the sixth interrogatory."

*Eighth Interrogatory*.—Answered by the answers to the 5th and 6th interrogatories.

*Ninth Interrogatory*.—Whether James Pancoast died without issue, &c. and who was his nearest relation of the whole blood?

*Answer*.—"That he hath been informed by his father that the said James Pancoast died without issue; that his nearest relations of the whole blood were his two brothers William and Joseph."

But the Court, [CHASE, Ch. J. DUVALL and DONE, JJ.] were of opinion, that the said testimony was legal and competent, and permitted the same to be read in evidence to the jury. The defendant excepted.

Verdict and judgment being for the plaintiff, the defendant appealed to the Court of Appeals, where the case was entered agreed, at the June Term, 1805.

## GENERAL COURT, OCTOBER TERM, 1802.

### ELLCOTT *et al.* vs. THE LEVY COURT, &C.

A *mandamus* cannot issue to compel a levy Court to levy a sum of money after the time for making it has passed. (a)

If such levy is made and the money collected and not paid over, the sureties of the collector would not be answerable for it. (b)

(a) Cited in *Motter vs. Primrose*, 23 Md. 501.

(b) Approved in *Com'rs vs. A. A. Co.* 20 Md. 460, where it was held that the Court would not direct a tax for particular purposes to be imposed after the time prescribed by law. Where the Acts of Assembly directed the Levy

MOTION for a *mandamus* to compel the Levy Court of Anne Arundel County to levy an additional sum of money under an Act passed at November Session, 1800, entitled, "An Act to levy on the assessable property of Anne Arundel County a sum of money for the purposes therein mentioned." The law was passed for the benefit of the applicants for the *mandamus*, and \* the dispute between them  
**360** and the Levy Court, was as to the construction of the above Act of Assembly; that is, whether the claim of the applicants against the county, to satisfy which the said levy was to be made, was to have the interest which had accrued thereon, and the costs which they had been put to in previous attempts to recover it, calculated to the time of laying the levy; or whether the naked claim only, without such interest and costs, was intended by that law to be assessed on the county.

The case was argued by *Martin*, (Attorney-General,) and *Harper*, for the motion, and by *Shaff*, for the Levy Court.

As the greater part of the arguments of counsel related to the construction of the Act of Assembly out of which the dispute arose, the Reporters deem it unnecessary to give them, the Court having decided that the *mandamus* could not issue, on a point unconnected with the construction of that law.

By the law alluded to, the levy it provided for, was to be laid at the same time with other county charges; and those charges were, by the general law on the subject, directed to be laid by the Levy Court within certain periods of the year. The Levy Court, in this instance, did assess on the county, under the above special law in

Courts to meet annually between 1st March and 1st October, to impose assessments, &c. it was held that this power, being specially delegated must be strictly pursued, and that such Court had no authority to adjourn beyond the 1st October, for the purpose of completing the levy, and that a tax imposed at such adjourned meeting was illegal, and no action could be maintained on the collector's bond for such tax. *State vs. Merryman*, 7 H. & J. 79. But in *State vs. Horner*, 34 Md. 569, it was held that the statutory requirement as to the time of making the levy and appointing the collector is directory only, with respect to the particular day on which the duty is to be performed; and that the action of the County Commissioners will be legal and binding, although done on some other day. Cf. *State vs. Balto. Co.* 29 Md. 524, where the case in the text is said to be an instance where the time prescribed was intended to be a limitation upon the power of the officers. Where the execution, &c. of the collector's bond is admitted, a recital therein that the obligor was appointed collector, cannot be denied. *Milburn vs. State*, 1 Md. 12; *Billingsley vs. State*, 14 Md. 369; *State vs. Horner*, *supra*. As to breach of the conditions of a collector's bond and pleading in an action thereon, see *Quynn vs. State*, *ante*, 36; *Johnson vs. State*, 3 H. & McH. 147; *Amos vs. Johnson*, *Ib.* 141; *State vs. Stewart*, 4 H. & McH. 270; *Laurenson vs. State*, 7 H. & J. 339; *State vs. Dorsey*, 3 G. & J. 75; *State vs. Scharff*, *Ib.* 95; *Bruce vs. State*, 11 G. & J. 382; *Baden vs. State*, 1 Gill, 165; *State vs. Carleton*, *Ib.* 249; *Waters vs. State*, *Ib.* 302; *Sheppard vs. State*, 3 Gill, 289; *McCaulley vs. State*, 21 Md. 556. As to summary proceedings against collector and his sureties under Code, Art. 81, s. 70, see *Sprigg vs. State*, 54 Md. 469.

favor of the applicants, such sum of money as the Court considered that law authorized, within the period fixed for laying the general levy on the county. When the *mandamus* was applied for, that period had elapsed, and that was, as will be seen by the Court's opinion, the ground on which the *mandamus* was refused.

CHASE, Ch. J. In this case the Court are not satisfied as to the construction of the Act of Assembly; but they are of opinion that a *mandamus* ought not to issue. The Act of Assembly directs the money to be levied by a particular day—this is a special authority, and as the time has elapsed, the Court think it would be improper to order the *mandamus*, as the Levy Court would have no authority under the law to make the levy. Even if the levy should be made, and the collector should become insolvent, his securities would be discharged upon the same principle that the securities of the former collector, (Goldsmith,) were exonerated (*Vide ante*, 36.) And in that case the people of Anne Arundel County might be burthened a third time with the payment of the claim of Messrs. Ellicotts. 361

*Mandamus refused.*

#### GENERAL COURT, OCTOBER TERM, 1802.

##### GOLDSMITH'S Adm'r vs. TILLY.

Every ground of relief in equity against an award, is equally open at law, on motion, in a summary way. (a)

Misbehavior of the arbitrator; or legal objections or a palpable mistake in law or fact, apparent on the face of an award, are the only ground for setting it aside.

SELBY vs. GIBSON, *note*.

An award set aside and the cause re-instated, where the original arbitrators, after reducing the evidence to writing disagreed, and chose a third person, to whom the evidence so reduced to writing, was delivered, and the award made; and it not appearing that the party, against whom the award was made, had notice of the time of meeting of the new arbitrator, nor was he present.

DEBT on a deputy collector's bond. This cause was at a prior term referred in the usual manner to two arbitrators, with authority, if they differed, to call in a third person. The arbitrators did differ, and in pursuance of the terms of the reference chose a third person. The umpire, and one of the original arbitrators, with whom he agreed, returned an award, in which they stated that due notice had been

(a) Approved in *Rolason vs. Carson*, 8 Md. 221, and cited in *Woods vs. Matchett*, 47 Md. 890. Cf. *Howard vs. Warfield*, 4 H. & McH. 21, *note*; *Tulard vs. Fisher*, 3 H. & McH. 78; *Dorsey vs. Jeoffray*, *Ibid*, 81; *Oliver vs. Heap*, 2 H. & McH. 320, *note*.

given to the parties of the time and place of meeting of the arbitrators; and that differing in opinion, they chose an umpire, who, in conjunction with them, after having first considered the evidence adduced by the parties, who were present, and agreeing in opinion respecting the same, the umpire and one of the arbitrators, awarded that judgment be entered for the plaintiff against the defendant for the penalty of the bond on which the action was brought, and costs; to be released on the payment of a certain sum of money with interest thereon, &c. and costs.

The defendant, by his counsel, entered a *caveat* on the award, and assigned the following reasons:

1. Because the umpire, or third person called in, did not examine the whole matter, in dispute; but formed his opinion from a partial consideration of the subject.

2. Because the defendant had no notice of the meeting of the two persons who have signed the award.

**362** \* 3. Because the arbitrators acted against law and justice in allowing to the plaintiff against the defendant, a sum of money, illegally directed to be levied by the Levy Court of Anne Arundel County.

4. Because they awarded a sum of money to the plaintiff against the defendant for the non-collection of an illegal assessment.

5. Because there evidently appeared nothing due from the defendant to the plaintiff, unless on account of the illegal assessment directed to be levied by the Levy Court aforesaid.

*Johnson*, for the defendant, contended that the umpire should have investigated the whole subject-matter, and that he could not proceed on the report of the two arbitrators as to what was the evidence in the case. That he could not award partially. *Kyd on Awards*, 63; *Tillard vs. Fisher*, 3 *Harr. & McHen*, 118. That notice ought to have been given to the parties by the umpire, for in the case of *Selby vs. Gibson* in this Court, (a) the award was set aside on this ground. *Quynn vs. The State*, ante 36.

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(a) *Selby vs. Gibson*, in the General Court at May Term, 1801. It was an action of trespass, which by consent of the parties was referred to John Callahan and Nicholas Harwood, Esquires, with power, in case of disagreement, to choose a third person, &c. in the usual manner. At May Term, 1800, an award was returned and signed by Nicholas Harwood and James Disney, in the following words: "In pursuance of the above order of reference, we hereby certify to the Judges of the General Court, that after hearing and examining the evidences of both plaintiff and defendant in the above cause, and the parties being present, the said John Callahan and Nicholas Harwood could not agree, but differed in opinion; and in virtue of the power vested in them by the order, they chose the subscriber, James Disney, as a third person. We, Nicholas Harwood and James Disney, after examining the evidence aforesaid, in the presence of Mr. Callahan one of the original referees, and fully considering all circumstances in the case, do



*Martin*, (Attorney-General,) and *Shaafl*, for the plaintiff.

\* CHASE, Ch. J. delivered the opinion of the Court. Every ground of relief in equity against an award, is equally open in this Court, upon motion, in a summary way. 3 *Burr.* 1258, 9. **364**

The Court will not enter at all into the merits of the matter referred to arbitrators; but only consider such legal objections as appear on the face of the award, and such as go to the misbehavior of arbitrators. 2 *Burr.* 701; *Adj. Ca.* 109.

A palpable mistake in law or fact, is good cause to set aside an award, if it is apparent on the face of the award. 1 *Vern.* 157, 8; 2 *Vern.* 705; 3 *Atk.* 644; 1 *Atk.* 64; 1 *Ch. Rep.* 76; *Brownl.* 63; *Cro. El.* 904; 1 *Rol. Ab.* 251.

The Court will not unravel the matter and examine into the justice and reasonableness of what is awarded. 1 *Stra.* 301; *Adj. Ca.* 105.

Judgment entered on the award.

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award that the defendant John Gibson, pay to the plaintiff, Joseph Selby, the sum of fifty pounds current money, the damages by us awarded in the said action of trespass, and the costs of suit. Given under our hands and seals this 10th of June, 1800."

A caveat was entered by the defendant against the award, and the following reasons were assigned why judgment should not be entered thereon:

1. Because James Disney, the third person said to be chosen by the original arbitrators, never heard any evidence adduced by either party, and joined in the said award without any testimony.

2. Because after the appointment of the said James Disney, he, together with the other arbitrators, or one of them, met without giving any notice to the defendant of the time of meeting, by which means the defendant was deprived of an opportunity of making his defence before the said James Disney.

Messrs. Callahan and Harwood were examined as witnesses by the Court, and it was proved that Mr. Callahan, as one of the arbitrators with Mr. Harwood, in presence of the parties, reduced to writing the whole of the evidence taken before them while they acted as arbitrators; that on their disagreeing, they chose Mr. Disney; that the evidence, thus reduced to writing, was delivered to Mr. Disney; that Mr. Harwood and Mr. Disney agreeing in opinion, made the award. The witnesses were not certain that the defendant had a knowledge of the day fixed on for the meeting of Mr. Disney with them as arbitrators; they think the defendant said he had additional testimony, but none was taken; nor did the defendant attend on the day the award was made.

THE COURT set aside the award, and re-instated the cause.

*Key* and *Johnson*, for the plaintiff.

*Martin*, (Attorney-General,) and *Shaafl*, for the defendant.

## GENERAL COURT, OCTOBER TERM, 1802.

## STONE vs. RAFTER.

The defendant may, in an action of assumpsit for money had and received, give in evidence an account in bar without pleading it in discount or filing it. (a)

An account in bar or set-off is inadmissible in evidence in an action of *assumpsit* on a special agreement. (b)

ASSUMPSIT, and the declaration contained two counts, one for money had and received, and the other on a special agreement. The special count stated—That on the 22d February, 1797, the defendant sold to the plaintiff the land lying in Allegany and Washington Counties, which he the defendant had purchased of Michael Bidenger, supposed to contain six and three-quarter acres, being the same land on which the mills are erected, and where the defendant then resided; that the defendant, by a writing under his hand and seal, obliged himself to convey, or cause to be conveyed the said land, together with the mills and improvements, unto the plaintiff, in fee simple, clear of incumbrances; and that the plaintiff did then, in consideration thereof, pay to the defendant 295*l.* 2*s.* 6*d.* current money, in part of the purchase of said land and premises. That the defendant had not conveyed the said land, &c. according to the said agreement. The \* breach assigned was that the defendant had **365** not paid the money nor conveyed the land, &c. The defendant pleaded *non-assumpsit*, and issue was joined. The case came on for trial at the last term, when—

1. The plaintiff offered in evidence to the jury, the contract referred to in the second count in the declaration, and that he had paid to the defendant the sum of 295*l.* 2*s.* 6*d.* current money on the 22d of February, 1797, on account of the property mentioned in the said contract, and that the defendant had no title to the said property, and had not conveyed the same to the plaintiff.

The defendant then gave evidence to the jury, that he had served the plaintiff as a manager of a place belonging to the plaintiff, three years, and that his services were reasonably worth £75 current money per year, during that time; and that he had advanced divers sums of money to different persons for work and labor done by them on the property of the plaintiff; and for provisions furnished for the

(a) A set-off must be specially pleaded. *Burch vs. State*, 4 G. & J. 441; *Sangston vs. Maitland*, 11 G. & J. 286. But when the abatement in the amount claimed by the plaintiff grows out of, and forms part of, the contract in which the claim of the plaintiff originated then a plea of set-off is unnecessary. *Carroll vs. Quynn*, 18 Md. 379.

(b) But see Rev. Code, Art. 64, secs. 74, 75; *Warfield vs. Booth*, 33 Md. 63; *Beall vs. Pearre*, 12 Md. 550; *Abbott vs. Gatch*, 18 Md. 314.

slaves and stock of the plaintiff, on his said place, where the defendant was manager. Whereupon the plaintiff's counsel objected, that no such testimony could be admitted, the defendant not having pleaded the same in discount, nor filed an account in bar, and referred the Court to the Act of 1785, ch. 46, s. 7.

But the Court, CHASE, Ch. J. and DUVALL, J. (DONE, J. did not attend,) were of opinion, that the same was proper evidence on the count for money had and received, and admitted it to be given to the jury. They cited *Moses vs. Macferlan*, 2 Burr. 1010.

A juror was withdrawn, (on the motion of the counsel of the defendant for leave to amend,) and an account in bar was filed, and the cause continued until this term, when a jury was again sworn.

2. *Mason* for the defendant, then offered in evidence the account in bar which he had filed at the last term.

*Shaaff*, for the plaintiff, objected, and contended that this was not such an action to which the defendant could plead a discount in bar, and he referred to the Act of 1785, ch. 46, s. 7, and *Espinasse*, 243. He admitted the defendant might plead a set-off to the first count, and that filing an account in bar, and pleading a set-off, were the same thing; but that to the second count a set-off could not be pleaded. 366

The Court, DUVALL and DONE, JJ. (CHASE, Ch. J. absent,) decided, that the account in bar was inadmissible as evidence on the second count in the declaration.

## GENERAL COURT, OCTOBER TERM, 1802.

### PRESTON vs. PRESTON.

The heir at law of a deceased joint obligor is not answerable at law upon the bond. (a)

Where A. the principal in a bond died, and B. the surety therein, having been compelled to pay the debt, brought an action of *assumpsit* against the heir of A. to recover back the money so paid, it was held, that the defendant could not be held liable, unless sued as heir, and unless the declaration set forth that assets had come into his hands sufficient to pay the debt, and that he had expressly promised to pay it. (b)

(a) But, under Rev. Code, Art. 64, sec. 51, where two or more persons are jointly bound by bond, note, &c. and one or more of such persons shall die, his or their executors and heirs shall be bound in the same manner, and to the same extent, as if the person so dying, had been bound severally as well as jointly.

(b) Cited in *Gist vs. Cockey*, 7 H. & J. 140. See *Hammond vs. Gaither*, 3 H. & McH. 148, note; *Warfield vs. Owens*, 4 Gill, 364. A judgment against

ASSUMPSIT for money had and received, paid, laid out and expended, and lent and advanced, and on an *insimul computassit*. The general issue was pleaded.

The plaintiff, to support the issue on his part, read to the jury a joint bond, executed on the 19th of September, 1782, by one Martin Preston, and himself as surety for the said Martin, to Dennis Bond, for the sum of 33*l.* 13*s.* 4*d.*; also a judgment by confession rendered upon that bond in Harford County Court in August, 1797, in favor of the obligee, against him the plaintiff, as the surviving obligor—the said Martin being dead. He also read in evidence, a receipt dated the 1st of August, 1798, given by the assignee of the obligee for the debt and costs recovered by the judgment. He also proved, that [Martin Preston died intestate in the year 1787, and that the defendant is his son and heir at law; that lands in fee simple, to an

**367** \* amount greatly exceeding the claim in this action, descended to him, and that he is in possession of the same.

The defendant, to prove that Martin Preston left personal estate to the amount of £200, read in evidence the inventory of said estate, made by his administratrix on the 27th of January, 1789, and a certificate of the Register of Wills of Harford County, shewing that the administratrix had settled no account with the Orphans' Court, or returned any accounts paid by her as administratrix.

The defendant then prayed the opinion of the Court, and their direction to the jury, that unless there was an express promise by the defendant to pay the debt, he was not answerable, and that the plaintiff could not otherwise recover.

**368** *Key*, for the defendant. \* An action, for money had and received, against an heir, cannot be supported unless he has expressly promised to pay the money. The law raises no promises. *Moses vs. McFerlan*, 2 Burr. 1005; 2 Blk. Rep. 219; Esp. 6; Cowp. 290.

*Johnson and Stephen*, for the plaintiff. The obligee in a bond may sue either the heir or executor. The real and personal estate are equally responsible. Esp. 218. It is true the personal estate shall be tried first in equity; but at law there is no distinction. There is no discrimination in a common law jurisdiction in favor of the realty, to the disadvantage of the personalty. 2 Atk. 426.

DUVALL, J. (CHASE, Ch. J. absent. DONE, J. concurred.) Under all the circumstances of this case, the Court think there is no doubt upon the subject.

On the death of Martin Preston, it being a joint bond, the debt survived upon Bernard Preston, and \* no action at law can be

**370** maintained upon the bond against the heir of Martin Preston:

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an administrator is not competent evidence as against real estate in the hands of an heir at law. *Tabler vs. Castle*, 22 Md. 102; *Gaither vs. Welch*. 3 G. & J. 259.

And the heir cannot possibly be answerable unless sued as heir, and unless he had promised to pay the debt. This is a suit against him without stating that he is heir; without stating that assets had come to his hands, and without stating an express promise to pay.

*Plaintiff non-suited.*

## COURT OF APPEALS, NOV. TERM, 1802.

### GARRETSON vs. COLE.

If a patent be obtained fraudulently, or contrary to the rules of the land office, it is voidable or void in a Court of law, as well as in a Court of equity—and if suit be first brought at law, in which the validity of such patent might be tried, equity will not afterwards interfere. (a)

Where a Court of equity decrees a conveyance from the defendant to the complainant, and on the service of a copy of the decree, under seal, with the tender of a deed in pursuance of the decree, the defendant refuses to deliver up possession, and to execute the deed, a writ of injunction to compel delivery of the possession, may be issued.

Form of such writ.

If that writ be not obeyed, the Court will grant an *habere facias possessionem*. (b)

Form of such writ.

The cause re-instated, after having been decided, in pursuance of an Act of Assembly authorizing the same to be done. (c)

In the trial of an action of ejectment, either party may avail himself of equitable circumstances in his case to prevent the relation of a grant to the certificate of survey, if such circumstances exist; and whether there are such circumstances or not, it is competent for a Court of law to decide. (d)

APPEAL from a decree of the Court of Chancery, in favor of the complainant in that Court. The bill stated that Cole, (the appellee,)

(a) But see *Cook vs. Carroll*, 6 Md. 104, *contra*.

(b) In *Morrill vs. Gelston*, 32 Md. 120, the Court said that although the reporters style the writ in the case in the text, a writ of *hab. fac. poss.* it is not so called by the Chancellor, nor is it so in fact. As to when a writ of *habere facias possessionem* may be issued, and as to the practice thereunder in equity, see Rev. Code, Art. 64, sec. 145; *Harryman vs. Starr*, 56 Md. 63; *Schaefer vs. Amicable*, 53 Md. 83; *Nutwell vs. Nutwell*, 47 Md. 35.

(c) In *Dorsey vs. Dorsey*, 37 Md. 75, it is said that the Act referred to in the case in the text was passed under peculiar circumstances, and it did not appear that any question was made or argued touching its constitutionality; and it was signified that in the opinion of the Court, the Act of 1872, c. 310, whereby the Court of Appeals was authorized to re-open certain cases which had been previously decided, was an usurpation by the Legislature of judicial power within the purview of the 8th Article of the Bill of Rights.

(d) See *Garretson vs. Cole*, 2 H. & McH. 305, *note*; *Kelly vs. Greenfield*, *Ibid*, 72; *Howard vs. Cromwell*, 4 H. & McH. 203; *Peter vs. Mains*, *Ib*. 271.

on the 12th of February, 1771, obtained a common warrant from the land office for 60 acres of land, and paid the caution money on it. That within five days from the date of the warrant, he took it to the surveyor of Baltimore County, (to whom it was directed,) and had it located on certain vacant land in that county, which the appellee had first discovered, adjoining Grindall and Taylor's Addition, and that the surveyor endorsed that location on the warrant, and also entered it in his book, but that both the warrant and the book, were either mislaid or lost. That this warrant was renewed from time to time, according to the rules of the land office, until the 8th of January, 1773, when it was executed, and a certificate thereof returned, calling the land Cole's Discovery, and stating it to contain 310 acres, and that a patent for the same issued to the appellee on the 10th of April, 1775. That Garretson, (the appellant,) having been informed by one of the deputy surveyors of the county aforesaid, of the vacancy which the appellee had, as above stated, discovered, did, on the 10th of May, 1771, get a special warrant for one hundred acres of vacant land lying in Anne Arundel County, which had been long before granted to one John M'Donald, renewed in his,

**371** \* (the appellant's) name, with liberty to execute it on the same quantity of vacant land in Baltimore County, adjoining Sheredine's Discovery, Mount Royal and Grindall. That he had this warrant executed, and certificate thereof returned, dated the 17th of June, 1772, calling the land The Silent Cyphers of Africa, and making it contain 665 acres. That this warrant was not executed, according to its express directions, on vacant land adjoining the tracts called Sheredine's Discovery, Mount Royal and Grindall, but that elder tracts were crossed, and vacant land included by it, which did not lie adjoining these three tracts, taking in, in this way, all the vacancy embraced by the appellee's certificate, except about 111 acres. That the appellant's certificate was, by this fraud, and that of the deputy surveyor before mentioned, dated prior to the appellee's. That the appellee was entitled to a preference, because his warrant was located, (as he before stated,) by the endorsement and entry thereof in the surveyor's book, both of which were anterior to the actual date of the appellant's certificate; and because also the warrant of the appellee was executed according to the rules of the land office, and that of the appellant in opposition to them; but more especially, because the vacancy included in the appellee's certificate could not have been correctly included in the certificate of the appellant, as it did not adjoin the three tracts which his warrant called for. That in consequence of these facts, the appellee caveated the appellant's certificate, on the 22d of January, 1773, which caveat was never heard by the Judges of the Land Office, in consequence of the fraud and contrivance of the appellant, who on the 6th of November, 1775, petitioned said Judges for a dismissal of such caveat, stating that the appellee had removed out of the State

to a place called Juniata, a great distance from this State, with an intention to reside there, in consequence of which the caveat was dismissed, and a patent issued to the appellant on his said certificate. That the appellee however never did remove away, but was living on the said land at the date of this petition \* which was known also to the appellant. That according to the practice of the land office at that time, a caveat could not be dismissed but after a hearing or notice to the parties, and their neglecting to attend. That the appellant having thus obtained a patent, brought an action of ejectment in the General Court against the appellee, for the said land, and got judgment thereon against him, that Court being of opinion that the appellant had the legal title from his certificate's being older, his patent having relation back to the date of the certificate. 2 H. & McH. 459. That execution was had on this judgment against the appellee for the costs, which he would have to pay, and possession given of the said land to the appellant. All of which doings of the appellant, and his confederates, are stated to have been contrary to equity and good conscience, and the bill therefore prayed for the usual process against the appellant, and that he might be compelled to convey to the appellee all the land included in the certificate of The Silent Cyphers of Africa, which was embraced by the appellee's certificate of Cole's Discovery, concluding with a prayer for general relief, &c. **372**

The appellant's answer denied all the fraud charged by the bill, and stated that he got M'Donald's warrant assigned to him for a valuable consideration. That his certificate had not been antedated by his contrivance, or that of the deputy surveyor, but bore date on the day it was executed, as it ought to have done. It admitted that the caveat stated by the bill had been put in by the appellee against the appellant's certificate, and that it had been dismissed on the petition stating the facts mentioned by the bill, but denied that the appellant had any knowledge of that petition, or gave his consent to its being filed as it was. It also admitted, that the facts stated in that petition were untrue. That the petition must have been filed by one Cox, who acted as the appellant's agent, having been spoken to by him for that purpose when he was going to Annapolis, but that he gave him no other instructions than to get the caveat dismissed. It denied that any other vacancy \* was included by the certificate of The Silent Cyphers of Africa, than lay adjoining the tract called Grindall, one of the tracts called for by the warrant; and stated, that if there was, it could not injure the appellant's title to that which did lay adjoining those tracts. It also admitted the judgment in the General Court, and the execution on it, and the delivery of possession, &c. as stated in the bill, and concluded with a prayer to be dismissed, &c. with costs. **373**

The proof taken under a commission in the cause, was the surveyor's deposition, stating that he thought that about 22 or 23 years

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back, he had made an entry on Cole's warrant, of its location, as stated in the bill, or in a book kept by him for that purpose, but that he burnt many papers supposed by him, at the time, to have been useless, amongst which he thought it likely was this warrant and book. He also stated, that the appellant's warrant was executed by his deputy; and several other facts not necessary to the understanding of the points decided by the Court, and which are therefore omitted to be stated by the Reporters.

HANSON, C. At February Term, 1797, passed the following decree, viz.

The said causes standing ready for hearing, and being submitted on the written arguments of the counsel on each side, the bill, answer, depositions, exhibits, arguments, and all other proceedings, were by the Chancellor read and considered.

The case appears to be thus:—Under the old government each of the parties obtained a patent in which the land in dispute is included. Each of the surveys, on which those patents issued, if properly made, was authorized by warrant; although neither of them was made under a special warrant designating the land, nor does there appear to have been any locations giving a title to the said land before the survey was actually made.

Garretson had the elder survey, Cole the elder patent; and according to an established doctrine at law, Garretson's title prevailed over Cole's. Cole therefore applies to this Court for a decree, either to **374** vacate \* Garretson's patent, or to compel him to convey: and the grounds of his application, supported by the proofs, are as follows:

Garretson's survey violated the fixed rules of the land office in running through and taking part of a patented tract, and by including two distinct pieces of vacancy, between which run the said part of a patented tract; the second piece of vacancy was afterwards comprehended in Cole's survey; and Cole therefore caveated Garretson's certificate.

By the uniform practice of the land office no caveat could be dismissed without hearing, or at least giving the caveator an opportunity of being heard; provided he could be served with notice of hearing. Instead of taking measures to have Cole's caveat fairly heard, Garretson, or some person in his behalf, preferred a petition to the Judges, suggesting that Cole had removed a vast distance from the Province; and as there was no probability of his return, the petition prayed a dismissal of his caveat, and a patent on Garretson's certificate. The caveat was dismissed, and a patent was issued without the Judges requiring any proof of the suggestion, which on a fair investigation would have turned out altogether untrue and groundless.

The object then of Cole's application to this Court is to be placed, in effect, in the situation, in which he would have been, after a full and impartial hearing before the Judges of the Land Office.

From the beginning of the Court of Chancery it has exercised its jurisdiction in relieving against fraud and imposition; and no instance can be shewn, where it has refused its aid to prevent the person who has practiced fraud or imposition from depriving another thereby of his right. If the agency of a third person could avail him in whose favor a fraud is practised, it is probable that such agency would always be procured; and therefore this Court will not distinguish between that which is perpetrated by a man on his own account, and that which he does in behalf of another.

\* The bare statement of the circumstances of this case, and of the principles of this tribunal, will perhaps point out on **375** which side the decision must be given.

It has been insisted on Garretson's part, that under a positive regulation prescribed by the Lord Proprietary to his Judges, he was entitled, from the lapse of time, to a dismissal of the caveat, without suggesting more than appeared on the records of the office; and that therefore the false suggestion ought to have no effect here. It is however certain, that as the Judges never adopted or obeyed a regulation which appeared injudicious and unreasonable, Garretson would not have obtained a dismissal of the caveat, had he grounded his application solely on the regulation and lapse of time. It was unquestionably the suggestion alone by which he obtained a grant prevailing at law against Cole's grant for land, to which Garretson never had an equitable title. If indeed he had, the Chancellor might properly say to Cole—"It may be true that Garretson has prevailed against you by a suggestion of falsehood, but on the other hand you had, against conscience, endeavored to deprive him of that to which he was honestly entitled. Let matters then remain as they are, neither you nor any other man will ever induce this tribunal to interfere for the purpose of permitting strict rules of office, or rigid law to defeat equity."

It has been urged too, that Garretson had surveyed under a proper warrant, and more than paid for that vacant land which was grantable to the first person surveying it, or in any manner locating it properly for making a survey; and which had not been surveyed or located for any other person, he had a clear equitable title at the time of Cole's survey; and that if Cole could have succeeded on a hearing of his caveat, he must have been indebted to a rigorous unmeaning regulation, against the plain dictates of justice. But every thing is not here stated. Every man applying for a warrant to secure land, knew, or ought to know, that, agreeably to the conditions of \* plantations, or the terms of the office, a grant would not be issued on a certificate, which either comprehended land **376** before granted or contained two distinct tracts. The very warrant

itself prohibited the running into an elder tract—and there were substantial reasons for adhering to the rule, directing only one tract in a grant. On its appearing to the Judges that the rule had been violated, they either vacated the certificate, or ordered it to be corrected by excluding the elder grant, or that piece of vacancy which was unconnected with or not contiguous to the beginning of the survey.

It is probable that many grants have issued on certificates like Garretson's, where the violation of the conditions neither appeared on the face of the certificate or plot, nor was otherwise shewn. But whoever obtained such a grant, succeeded against what may be termed his contract with the Proprietary; and it is by no means clear that if it had been an object, the grant might not be vacated. However, the question is not material to this cause. Incontrovertible it is, that when Cole made his survey, comprehending land, which he knew to have been already surveyed for Garretson, Garretson had neither a legal nor equitable right. Garretson's survey, as to that land, was an imposition on the Proprietary; and although on account of its fair appearance, it was not absolutely void, it was liable to be so construed, on shewing the violation of the rule. In short, there had been nothing done on the part of the Proprietary by way of contract, that Garretson should have the land. On the contrary, the Proprietary by his regulations, had declared that he would not grant the land on that survey made by Garretson. When Garretson had paid the caution money, the agent did not receive it, as money paid for two distinct pieces of vacancy, and a parcel of land before granted. The agent received it as money paid for one entire piece, which might be granted agreeably to the regulations—and Garretson's certificate had told him that it was one entire tract. How then can Garretson possibly be supposed to have had any just

**377** \* title whatever or even an incipient title at the time of Cole's survey?

Upon the whole, it is this 25th day of March, 1797, by ALEXANDER CONTEE HANSON, Chancellor, and by the authority of this Court, adjudged, ordered and decreed, that the injunction heretofore issued in this cause be and it is hereby declared to be perpetual, and that the defendant, Job Garretson, by a good deed, to be acknowledged and recorded agreeably to law, give, grant, bargain and sell, release and confirm, unto the complainant, Richard Cole, and his heirs, all that part of the tract of land in Baltimore County called The Silent Cyphers of Africa, or The Silent Zephyrs of Africa, which is contained within the lines of a tract of land called Cole's Discovery; to have and to hold the said land to him the said Richard Cole, and his heirs, to the use of the said Richard Cole, and his heirs only.

It is further decreed, that each of the parties to this cause bear his own costs in this Court.

From this decree, Garretson appealed to this Court, and at June Term, 1799, the decree was entered affirmed with costs.

After this affirmance Cole, on the 19th of September, 1799, exhibited his petition to the Chancellor, stating the decree, and that Garretson had been served with a copy thereof under seal, and required to execute the deed exhibited, and to comply with the terms of the decree, and praying an attachment of contempt against Garretson for his non-compliance with and disobedience of the decree.

The Chancellor, on the same day, having considered the petition, and affidavit having been made to his satisfaction of the service of a copy under the Great Seal of the State, of the decree as stated in the said petition, and of the refusal and neglect or delay of Garretson to obey, fulfil, and perform the same, did adjudge and order, that attachment, returnable to the next term, be issued against Garretson for a contempt of the Court in refusing and neglecting, or delaying to obey, fulfil and perform, the said decree.

\* An attachment accordingly issued, and was returned  
“attached.” 378

On the 14th November, 1799, Cole again petitioned the Chancellor, stating that the attachment of contempt issued against Garretson for disobeying the Chancellor's decree, having been postponed at the request of Garretson, and his counsel, under an engagement to deliver possession of the land in dispute to Cole, on the second Tuesday of the present month of November, (provided the Court of Appeals did not reconsider and reverse their said affirmation,) and that as Garretson was under execution returnable to the Court of Appeals for the costs in this case, Cole did consent that the attachment should not be enforced until the second Tuesday of this instant—but that as Garretson had not complied with his engagement, and was continuing to commit waste on the land, Cole requested that the order for the sheriff to bring down Garretson, be renewed, &c.

The Chancellor did, on the same day, order that the sheriff bring into Court on the third day of December next, the defendant Job Garretson, whom the said sheriff, as appeared by his return, had attached in virtue of an attachment which heretofore issued, returnable on the first Tuesday of October last.

On the 3d of December, 1799, Garretson, by his petition to the Chancellor, after stating the decree and appeal to the Court of Appeals, further stated, that the said appeal was to have been argued at June Term, 1799, but owing to the sickness of one of the Judges no business could then be done; that the Court was adjourned until the last of August, when the petitioner's counsel was prevented by indisposition from attending, but he made an arrangement with Cole's counsel for the continuance of all the cases in which the petitioner's counsel was concerned, and to prevent any entry being made in any case to the injury of his clients. That the Court of Appeals, when

they met in August, set only part of a day; that no arguments were had before them, and that all cases meant to be \* argued were continued until the second Monday in November, except the appeal of said Garretson against said Cole, which was entered affirmed; that he is unwilling to suppose that this entry was obtained through trick and artifice; but he saith, he is informed and believes it to be true, that the Court had not examined the record, and determined upon the merits of the decree, but that no counsel attending for the petitioner, and the Court not knowing the reason of his absence, nor that the cause was meant for argument, the entry was made as an entry of course as far as the Court had any share in directing, or assenting to the entry. That soon after the adjournment of the Court of Appeals, the petitioner, to his great surprise was called upon by Cole to execute a deed to him, alleging that the decree was affirmed by the Court of Appeals; upon which the petitioner applied to his counsel, (who was confined to his bed by sickness,) who informed the petitioner it was impossible that the decree should be affirmed, or if it was affirmed it must have been so entered through accident or mistake, and advised the petitioner to sign no deed until he should be able to make inquiry into the matter. That in consequence of his refusing to execute the deed, an attachment was served on the petitioner, but that when he attended at Annapolis upon the said attachment, his counsel, who was then at that place, conversed with R. R. the counsel of Cole, upon the impropriety of the proceedings which had been had in the petitioner's case, and it was agreed by the said R. R. that no further proceedings should be had on the said attachment, until the Court of Appeals met, in order that if they thought justice required it, the entry of affirmance might be struck out, and the case be admitted to be argued; and an instrument of writing was signed by the said R. R. and the petitioner's counsel, and that the petitioner need not attend until the first Monday in November, which was so expressed, in consequence of the petitioner's counsel having been misinformed that the Court of Appeals had adjourned until the first instead of the second Monday in November.

**379** That the petitioner \* was again called upon and compelled to go to Annapolis on the first Monday in November, but having a letter from his counsel to the said R. R. who well knew the agreement to have been that he was not to be obliged to attend until the meeting of the Court of Appeals, the petitioner was again dismissed, and suffered to return home. That he has no doubt but had the Court of Appeals made a Court on the second Monday of November, to which they adjourned, they would have had the entry made in the said suit, struck out, and would have admitted the said cause to be argued, but unfortunately, by the absence of one of the Judges, no Court was held that could make any entry, or do any business. That in consequence of the Court of Appeals having twice failed to meet at the times when they might have had a session,

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there will be a necessity to have an Act of Assembly in order to enable the Court of Appeals to bring forward such causes as ought to have been decided at the sessions of November, 1798, and June, 1799, and which have been discontinued, as justice in their opinion shall require to be brought forward; and the petitioner expected there would be a provision, that if said Court shall think, under the circumstances of the petitioner's case, justice requires it, they shall be empowered to reinstate the said case, and make any entries therein which they might have made had they met on the said second Monday of November, to which day they adjourned. That all his desire is to have his cause fairly and candidly heard and determined; if on such hearing and determination, the decree shall be affirmed, he will cheerfully submit thereto, and comply therewith. That the petitioner hath been actuated by no want of respect to the Chancellor, or to the Court, but has declined doing any act which might injure his title in consequence of the reasons before stated. He feels the strongest confidence that the Chancellor, is one of the last persons in the State who would wish to prevent him from a fair and full discussion of his case in the Court of Appeals, or who would, had he known the circumstances of the case, suffered the process of the \* Court of Chancery to be used for such a purpose. He prays  
that all process upon the said attachment may be staid, &c. **381**

The Chancellor, on the same day, having considered this petition of Garretson's together with the deposition therein referred to, and the petition appearing reasonable, it was adjudged and ordered, that Garretson be discharged from the attachment issued against him at the suit of Cole, on his, Garretson's, paying the costs of the attachment; provided, nevertheless; that if, at any time hereafter, at the instance of Cole, and at discretion, the Chancellor may issue against Garretson an attachment or other process for not complying with the final decree obtained against him by Cole.

On the 21st of January, 1800, Cole renewed his petition to the Chancellor for an order directing the sheriff to bring into Court the body of Garretson; and the Chancellor on the 27th of the same month, passed an order that the sheriff of Baltimore County bring into the Court, on the first day of the next term, viz. on the 18th of February next, the body of Garretson, whom the said sheriff had returned attached—on the 19th of February, 1800, Cole filed a new petition, stating the decree and affirmance, and services, &c. and prayed for an attachment, &c.

*Martin*, (Attorney-General,) solicitor for Garretson, to whom the Chancellor had given an opportunity to shew cause why an attachment ought not to issue in this case, contended, that there had not been a proper foundation laid even for the former attachment which issued.

**384** \* The Chancellor, on motion of Cole's counsel, granted him leave to amend his last mentioned petition of the 19th of February, in any manner he thought proper. And the petition was amended, praying that the Chancellor would decree the title to be vested, and issue a writ of injunction, in the nature of the *habere facias possessionem*, to deliver to Cole the possession of the land and premises in the decree mentioned.

HANSON, C. on the 24th of February, 1800, passed the following decree:

"The complainant applies, by petition, for an injunction or process of some kind, to secure him the benefit of the decree, long since passed in this Court, and affirmed in the Court of Appeals.

The defendant, by his solicitor, insists that, notwithstanding the said decree and affirmance, there is no foundation for any process whatever.

The nature of the present contest requires, in the Chancellor's opinion, that he should make some remarks on proceedings, in which, from mere tenderness to the defendant, he went perhaps to at least the verge of impropriety. It would seem, as if some of those proceedings were expected to be ruinous to the complainant's cause; and contemptible indeed must be the jurisdiction of this Court, if from its defects, a man, in any case, is to derive no benefit from a decree, which it is authorized to make.

Although from the bill, answer and proofs, it appeared, that the defendant had merited a vacation of his patent, and that in strictness, a vacation might, and ought to be decreed, the Chancellor, on deliberation conceived, that he might only decree that, which **385** \* he supposed would fully relieve the complainant, without further loss to the defendant, than that relief required. He therefore decreed a conveyance by the defendant of the land in question.

To administer justice with mercy, the Chancellor has constantly considered the great duty of a Judge. Every Judge, on his entrance into office, should be enjoined to do this, and much is to be lamented, if the conduct of the persons to whom that mercy is intended to be shewn, shall dictate the necessity of administering strict justice, without regard to mercy. If they cannot consist with each other there is no doubt that the latter must yield to the former.

By the appeal of the defendant, the complainant had long been excluded from the benefit of the decree. The defendant was duly served with copy of it, under seal, to which was annexed a copy of the affirmance, and on proof to the satisfaction of the Chancellor, of the said service, and of the defendant's neglect, and even refusal to obey, an attachment for contempt was, at the complainant's instance, issued against him. But the complainant, by his counsel, soon after consented to waive, or suspend, the benefit of the attachment, until



the Court of Appeals should be applied to by the defendant at its next sitting, to reinstate the cause and decide on argument. By so doing he granted no inconsiderable indulgence to the defendant. But the defendant, disappointed in his expectation by the Court of Appeals, conceives that the Legislature will reinstate the cause, and, on his petition to the Chancellor, is absolutely discharged from the attachment, on the express proviso that another attachment, or other process, shall hereafter issue, &c., &c.

The Legislature has indeed passed an Act for reinstating all causes which went off the docket of the Court of Appeals undecided, but has made no particular provision, relative to this cause. It is however alleged, that notwithstanding an affirmance of the Chancellor's decree in the usual way, the cause has not been decided by the Judges of Appeals; that they alone can determine whether or not there has been a \* decision, and that this Court ought not to proceed until the decision shall have been obtained. **386**

The Chancellor will not presume to assert what that decision would or may be. He cannot be absolutely certain, that that honorable body will not say, that in a case where they have affirmed the Chancellor's decree they have not decided the cause. But when the Chancellor is applied to, as for a matter of common right, for process to enforce his decree, he is to be satisfied that there is just cause for refusing the process. He is otherwise to give his order for its issuing. The mere suggestion that the Court of Appeals may decide that a cause, in which they have affirmed a decree, has gone off undecided, is by no means, in his opinion, a reason, for refusing the process.

The only question, which the Chancellor has now to decide is, what is the proper process for giving the complainant the full benefit of the decree?

That another attachment might issue, the Chancellor, under the circumstances of the case herein before stated, entertains not the least doubt, but it certainly is not the best process for the complainant's purpose.

The defendant's counsel may be right in his idea, that the decree is in law equivalent to a conveyance, and if so there is no need of compelling a conveyance, nor would a conveyance only render the complainant full justice. However the Chancellor is satisfied, that the complainant was entitled to process to enforce the conveyance, and that the attachment which issued, was strictly proper, and reasonable. For although Garretson's deed might not be absolutely necessary for completing Cole's legal title, it was certain eligible, in order that all doubts, which might be entertained by Cole and others, unlearned in the law, might be dissipated, and the opinion in favor of his title established.

Now if the defendant was really satisfied that the decree was sufficient to invest Cole with the legal title, why should he refuse to

execute the tendered deed? With what color does he complain of the hardship \* to which the attachment subjected him. It is **387** the first time perhaps that a man in such a way has dared to complain of oppression, in being required to do that, which in his own opinion was to have no operation to his prejudice, and which had been directed by the adjudication of a Court of justice. If there be oppression it is by the decree, and not by the complainant's taking out under the Chancellor's order process to enforce it. Had this Court decreed a vacation of the patent instead of a conveyance of part of the land it contained, there would have been no ground for this complaint.

The process or writ, which will best serve the complainant, is an injunction to deliver possession. After much deliberation on the subject, and examination of the books, it appears to the Chancellor proper to be granted. Here has been a decree for vesting a legal title in the complainant by a conveyance from the defendant, whose neglect to perform the decree (even if it had not been served upon him) under the Act of 1785, has rendered the decree equivalent to a conveyance.

The complainant's title then is here established, and therefore he must be supposed in conscience and equity entitled to the possession.

An injunction for possession is not a new thing in a Court of equity. It has long been used in England; it is directed in certain cases by the aforesaid Act of Assembly; and it would disgrace our laws and administration of justice, if, after a title to land has been established by the adjudication of a Court, there could be no way of obtaining possession, but after obtaining judgment in ejectment.

On the whole it is adjudged, ordered and decreed, that the defendant Job Garretson, having neglected to execute the deed by the original decree in this cause directed, the said decree hath operated as the said deed would have operated, to convey unto the complainant Richard Cole, and his heirs, the land thereby directed to be conveyed; that the defendant Job Garretson deliver possession of the said land to the said complainant, and that an injunction issue from this \* Court, directing the said defendant to deliver the said **388** land to the said complainant."

Injunction accordingly issued as follows, viz: "Maryland, *sc.* The State of Maryland to Job Garretson, of Baltimore County, and every and all other person and persons whatsoever, who are in possession of all or any part of that part of the tract or parcel of land, situate in the county aforesaid, called The Silent Cyphers of Africa, or The Silent Zephyrs of Africa, which is contained within the lines of a tract of land called Cole's Discovery. Whereas it hath been represented to the Court of Chancery, in a cause wherein Richard Cole is complainant, and you, the said Job Garretson, are defendant, that by the original decree in the cause passed on, &c. it was decreed

that, &c. and that affidavit was afterwards made to the satisfaction of the Chancellor, of the service of a copy of the said original decree, under the Great Seal of the State, upon you the said Garretson, and of your refusal and neglect to obey, fulfil, and perform the said decree; and that by a subsequent decree or order made in the said cause, &c. it was adjudged, ordered and decreed, that you the said Garretson, having neglected to execute the deed by the said original decree directed, the said decree hath operated as the said deed would have operated, to convey unto the said complainant, Richard Cole, and his heirs, the land thereby directed to be conveyed, and that you the said Garretson should deliver possession of the said land to the said complainant, and that an injunction issue against you the said Garretson, to enjoin you to deliver possession of the said land to the complainant; and the matters stated in the said representation being all just and true, Therefore, in consideration of the premises, you the said Job Garretson, your servants, slaves, agents, and all persons assisting you, and every and all other person or persons in possession of the said land, are strictly enjoined and commanded, that you, each and every of you, do deliver, the possession of the said land and premises, and of every part and parcel thereof, to the said complainant Richard Cole, pursuant to the said decree; and that you cease from any further \* molestation of the said Richard Cole, in the quiet possession of the said land. Hereof fail not at your peril. Witness," &c. 389

On the 7th of March, 1800, Cole, by his petition to the Chancellor, represented, that on the 4th inst. he caused the injunction heretofore issued in this cause, for delivery of possession of the land specified in the said decree, to be served on the defendant Garretson, and on a certain T. S. a tenant in possession of part of the said land, as by the annexed affidavit appeared. That the said Garretson and T. S. both refused to comply with and obey the said injunction. He prayed that a commission or writ might issue to the sheriff of Baltimore County, to put the petitioner in possession of the said land, pursuant to the directions of the said decree and injunction, &c.

HANSON, C. on the 15th of March, 1800, ordered that a writ or commission issue as prayed.

*Habere facias possessionem* accordingly issued as follows, viz. "Maryland, &c. The State of Maryland, to the sheriff of Baltimore County, Greeting. Whereas by the original decree, passed in the Court of Chancery on, &c. in a cause wherein R. C. is complainant, and J. G. is defendant, it was decreed, &c. And whereas by a subsequent decree or order, made and passed in the said cause on the, &c. it was adjudged, &c. And whereas according to the decrees aforesaid, and in conformity therewith, on the, &c. an injunction did issue directed to the said J. G. his servants, slaves, agents, and all persons assisting him, and every and all other

person and persons in possession of the said land, commanding that he the said J. G. and all and every person or persons aforesaid, should deliver the possession of the said land and premises, and every part and parcel thereof, to the complainant R. C. and that he the said J. G. should cease from any further molestation of the said R. C. in the quiet possession of the said land: And whereas it hath been represented to the said Court of Chancery, that on the 4th of March instant, at the county aforesaid, a true copy of the injunction so as aforesaid issued was served on and delivered, \* in the

**390** presence of the said complainant, to the said J. G. and at the same time the original injunction, with the great seal appendant thereto, was shewn to the said J. G. and that the said complainant R. C. did then and there request and demand of the said J. G. that he would deliver the possession of the land in the said writ mentioned, according to the directions of the said writ, which he the said J. G. absolutely refused to do; and that on the same day, and in manner aforesaid, a true copy of the said writ of injunction was also shewn and delivered to T. S. a tenant of the said J. G. and the original writ, with the great seal as aforesaid, was also shewn to the said T. S. and that the complainant R. C. then and there made the same request and demand of the said T. S. which he then and there absolutely refused to comply with; and the said R. C. having applied to the said Court of Chancery for additional process to enforce the said decrees. Know ye therefore, that to complete and carry into full effect the decrees of the said Court of Chancery, made and passed in manner aforesaid, the said Court of Chancery hath given, and from this time doth give to you, full power and authority to the land and premises aforesaid, situate in Baltimore County aforesaid, and in the decrees and injunction aforesaid mentioned and expressed, you approach and enter, and from thence the said J. G. and the said T. S. as well as all and every other person or persons in possession of the premises being, against the form and effect of the decrees and injunction aforesaid, you remove, and the said R. C. in full, quiet, and peaceable possession of all and singular the premises aforesaid, immediately, and from time to time, as often as necessary, you put and place; and that the said R. C. so being put and placed in possession, you protect and keep quiet; and therefore you are hereby commanded, that immediately after the receipt of this writ, to the land and premises aforesaid you approach and enter, and the said J. G. and the said T. S. as well as all and every other person and persons in possession of the said land and premises being, against the form and effect of the decrees and injunction aforesaid, from the

**391** possession \* thereof you remove, and to the said R. C. the full, peaceable, and quiet possession of all and singular the premises, you deliver, put and place, and so from time to time as often as necessary; and the said R. C. so being put in possession, you preserve, keep and continue, and cause to be preserved, kept and con-

tinned, according to the true intent of the decrees and writ of injunction aforesaid, and of this writ. Witness," &c.

By the Act of November Session, 1800, ch. 88, entitled, "An Act to empower the Judges of the Court of Appeals to reinstate the cause of Job Garretson against Richard Cole," the Judges were authorized and empowered, on motion, at their next session, to reinstate the said cause, if in their judgment and opinion, under all the circumstances of the case, the same would tend to do justice between the parties. The preamble to the said Act stated, that it was represented that the said case at June Term, 1799, was decided without argument, by reason of the indisposition of the appellant's counsel, and that the decision of the said cause involved principles of great consequence to the titles to real estate; that the Court of Appeals had expressed their regret, that the law of the last session did not authorize them to reinstate the said cause for the purpose of hearing an argument thereon, and had intimated their willingness and desire that the same should be reinstated.

This Court, in virtue of that Act, at June Term, 1801, on motion of the appellant's counsel, reinstated the said cause, and the same was argued by *Martin*, (Attorney-General,) for the appellant, and *Ridgely* and *Harper* for the appellee, who cited *Bowen vs. Norwood*, 2 H. & McH. 201.

The Court of Appeals [MACKALL, JONES, POTTS, and DENNIS,] (RUMSEY, Ch. J. absent) at this term reversed the decree of the Court of Chancery and directed the Chancellor to dismiss the bill of complaint, and that each party should pay his own costs, both in the Court of Chancery and in this Court.

\* The Court of Appeals also gave the following reasons for their reversal of the decree. 398

"In the argument of this cause, the doctrine of relation was fully discussed by the counsel, and seemed to be considered as making an important part of the case, and thence it may be inferred, that it may have had influence on the decision of the Court.

It is therefore proper to state, that the Court do not consider the doctrine of relation, as established by the Courts of justice in this State, as at all involved in the question decided by this Court, and neither enlarged or restricted by their decision, nor in any manner operating on the case between the parties, so far as the same was before this Court as a Court of equity.

In the trial of the ejectment, mentioned in the bill between the parties, in the General Court, the defendant might have availed himself of any equitable circumstances in his case, to prevent the relation claimed by Garretson of his grant to the date of his certificate, for the tract of land called the Silent Cyphers of Africa, if such circumstances existed. Whether there were such equitable circumstances in his case was proper for the General Court to decide.

On the trial, the Complainant hath attempted to establish as grounds for relief, that the rules of the land office had been violated by Garretson in executing his warrant, and that the caveat of Cole to his obtaining a grant was discharged on a false suggestion by him, and the patent obtained by fraud. On this view of the subject, we think that Cole hath not supported such a case as entitled him to the relief prayed and decreed by the Chancellor."

GENERAL COURT, (E. S.) APRIL TERM, 1803.

PARROTT vs. GIBSON.

In an action by the assignee of a bond, under the Act of 1763, ch. 23, (Code, Art. 9, s. 8,) against the assignor, it is not necessary to prove the execution of the bond.

But there must be proof that the assignee used due diligence to recover the money from the obligor in the bond, and that the assignment was signed and sealed by the assignor. (a)

DEBT upon a writing obligatory, which the defendant had assigned to the plaintiff, under the Act of 1763, ch. 23, and upon which the plaintiff, without \* neglect or delay, brought suit against the obligor, who was committed on a surrender by his bail. *Nil debet* pleaded, and issue joined.

*Earle* and *J. Bayly*, for the defendant, contended, that the bond, until its execution was proved, could not be offered in evidence to prove the assignment, and that *nil debet* was the only plea that left the defendant at liberty to make the objection. That the suit was collateral to the bond, which was but inducement where the assignee sues in his own name.

*Carmichael* and *Houston*, for the plaintiff, contended, that if the bond was only inducement it was still less necessary to prove it.

CHASE, Ch. J. The Court are of opinion, that it is not necessary to prove the execution of the bond. The assignee takes the assignment on the credit of the assignor, and having paid a consideration has a right to resort to the obligee, having used due diligence to recover the money from the obligor. The assignment must be proved, and that the plaintiff has used due diligence to get the money from the obligor.

The witness to the assignment was then produced, who proved his own subscription, and that of the defendant in his presence. But he could not prove that the defendant affixed his seal to it.

CHASE, Ch. J. To support a suit under the Act of Assembly against the assignor of a bond, there must be proof that the assignment was sealed by the assignor. *Verdict for the defendant.*

(a) Cf. *Boyer vs. Turner*, 3 H. & J. 285; *Lucas vs. Byrne*, 35 Md. 485.

GENERAL COURT, (E. S.) APRIL TERM, 1803.

COLLINS *et ux.* Lessee *vs.* NICOLS *et ux.*

The declarations of a deceased witness to a will are not evidence of his signature. (a)

Where all the witnesses to a will are dead, there must be proof of the testator's hand-writing, and of the hand-writing of all the witnesses; and where the witnesses set their marks, there must be proof that such marks were made by them.

EJECTMENT for Tully's Addition Corrected, Tully's Addition, and Roe's Lane, lying in Queen Anne's County. General issue pleaded.

\* 1. At the trial of the cause, it was admitted that a certain Samuel Roe, under whom the lessors of the plaintiff claimed **400** the lands, for which the suit was brought, as devisees, and the defendants as heir at law, died seized of the said lands; and the plaintiff, in support of the issue on his part, produced an instrument of writing, dated the 5th of May, 1776, purporting to be the last will and testament of the said Samuel Roe, and to be signed and sealed by him, and to be witnessed by Joseph Bicklin, Thomas Wiggins and Thomas Roe, having the name Thomas Roe signed to it, and marks, purporting to be the marks of Joseph Bicklin and Thomas Wiggins, affixed thereto; by which instrument the testator devised the lands mentioned in the declaration to Mele Roe, daughter of his brother Thomas Roe, and one of the lessors of the plaintiff, and appointed Samuel Roe his executor. The following indorsement was made by the deputy commissary on the 16th of April, 1777; "The probat of the within will objected to by Ben. Elliott, who married the daughter of the deceased." The plaintiff also produced a renunciation by Samuel Roe as executor, with a request that administration might be granted to Benjamin Elliott; and he gave in evidence that Thomas Roe, Joseph Bicklin and Thomas Wiggins were, at the time when the said instrument bears date, neighbors of the said Samuel Roe, the testator, and that one of them, Joseph Bicklin, lived on his land, and that all of them are now dead. That the name Thomas Roe, so signed to said instrument, was in the hand-writing of the said Thomas, and that said instrument itself was in the hand-writing of the late Reverend Samuel Roe, who is now dead, and who was the nephew of the said testator, and that he was a man of fair and respectable character. He further gave in evidence, that the said Amelia, to whom the lands mentioned in the declaration are devised in the said instrument, lived with the testator at the time it bears date, and until his death, which happened about a year after, and that she was not more than three or four

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(a) See *Collins vs. Elliott*, ante 1.

years of age at his death. That the testator expressed for the said Amelia the same affection as is \* usual for parents to show to  
**401** their children. That her mother was also at the same time living with him, and was the wife of his brother. That the testator had only one daughter, who was at the date of the said instrument married to Benjamin Elliott. That the testator died on or about the 1st of April, 1777, and the said Elliott entered, in the month of April of the same year, a caveat against the probat of the said will. The plaintiff further offered in evidence to the jury, that the name Samuel Roe, signed to the said instrument of writing, was the hand-writing of the said Samuel Roe, whose will the said instrument purports to be, and that the words Joseph Bicklin his mark, and Thomas Wiggins his mark, are in the hand-writing of the testator, or of his nephew. The plaintiff further offered evidence, that the said Bicklin and Wiggins were illiterate and incapable to write, and he produced witnesses to prove that the said Bicklin and Wiggins, before their death, and before and after the death of the said Samuel Roe, the testator, declared that they had witnessed a will made by the said Roe; and he offered to prove, by the wife of Bicklin, that about the time when the said instrument is dated, Bicklin, was sent for by the testator, and that he went, and on his return informed her that the said testator had executed his will, and that the said Wiggins, Thomas Roe, and himself, had witnessed it.

CHASE, Ch. J. The Court are of opinion that the plaintiff cannot give in evidence the declarations of the witnesses whose names are signed to the will, and they refuse to permit the same to be given in evidence; and the Court do determine, that the plaintiff shall not read to the jury the contents of the instrument of writing purporting to be the will of Samuel Roe; and that upon the evidence which has been given to the jury by the plaintiff, it shall not be submitted to the jury whether the said Samuel Roe did execute the said will in the manner, as by the statute in such cases made and provided, required. The plaintiff excepted.

**402** \* 2. The plaintiff then, to establish the said will, gave in evidence to the jury, that the said Thomas Roe, Wiggins and Bicklin, were dead; and to prove the signature of the said Thomas Roe, produced a witness, who swore that he was well acquainted with the hand-writing of the said Thomas Roe, and had seen him write, and that the name "Thomas Roe" signed to the said instrument resembled the hand-writing of the said Thomas Roe, and was as he believed his hand-writing. He further offered to give evidence to the jury, that the said Thomas Roe in his life-time declared, that he had signed his name as a witness to a will of Samuel Roe; and that after the death of the said Samuel Roe, he the said Thomas Roe saw the paper aforesaid now produced, and his said name thereto subscribed, and did declare that his name thereto subscribed was his



hand-writing, and that he had set his name thereto at the request of the testator.

CHASE, Ch. J. The Court are of opinion that the plaintiff may prove the hand-writing of Thomas Roe, one of the witnesses, whose name is signed to the will, but the declarations of the said Thomas Roe are not legal evidence to prove the hand-writing of the witness, and they refuse to permit the same to be given in evidence to the jury.

The Court are also of opinion, that there must be proof of the hand-writing of the testator, and of all the witnesses, before the will can be given in evidence; and where the witnesses have put their marks, there must be proof that such marks are the marks of the witnesses. The plaintiff excepted.

*Martin*, (Attorney-General,) *Scott* and *Earle*, for the plaintiff.

*Wright*, and *J. Bayly*, for the defendants.

Verdict and judgment for the defendants, and the plaintiff appealed to the Court of Appeals.

\* The Court of Appeals, at June Term, 1808, (E. S.) affirmed the judgment of the General Court. **403**

## GENERAL COURT, MAY TERM, 1803.

### GILL vs. COLE.

In an action of trespass for mesne profits, the plaintiff recovers damages only for the use and occupation of the land, and not for trespasses committed during the same period.

A recovery therefore in such action is no bar to an action of trespass *q. c. f.* The moving of fence rails is a trespass, for which damages may be recovered in an action of trespass *q. c. f.* notwithstanding a recovery in an action for mesne profits, unless that removal was necessary for the use and occupation of the land.

TRESPASS *quare clausum fregit*, for breaking and entering Cole's Struggle on the 1st January, 1800, and removing a fence, with a *continuando*, on divers days, &c. between that day and the 1st January, 1801. The writ issued the 31st March, 1801. The defendant pleaded *non cul.* and issue was joined—a warrant of resurvey issued and plots were returned.

It appeared in evidence at the trial, that on the 13th May, 1794, the plaintiff's lessee brought an action of ejectment against the defendant for Cole's Struggle and Strife. That at May Term, 1797, a verdict and judgment was obtained for the said lessee for a part of Cole's Struggle. That on the 22d June, 1797, the defendant removed that judgment to the Court of Appeals, by writ of error; that the judgment was affirmed in June, 1800; that on the 29th of October,

1800, a writ of *habere facias possessionem* issued, and possession was delivered to the plaintiff's lessee on the 19th of March, 1801; that the writ in this cause issued the 31st March, 1801; that on the 8th of July, 1801, the plaintiff in this cause brought an action of trespass for *mesne profits* against the defendant, in Baltimore County Court, for dispossessing the plaintiff of Cole's Struggle and Strife, and for the use and occupation thereof from the 10th June, 1793, until the 29th October, 1800, to which action the defendant appeared and pleaded *non cul.* and issue was joined, and afterwards, in November, 1802, the defendant confessed a judgment for \$30 damages and costs.

The plaintiff in this cause gave in evidence to the jury, that the defendant in the month of September, 1799, removed 185 pannels of fence, from a part of Cole's Struggle which had, previous to such removal, \* been put up there by the defendant; and that the

**404** said part of Cole's Struggle belonged to the plaintiff.

The defendant then gave in evidence to the jury, the action of ejectment and recovery before mentioned, for the said part of Cole's Struggle, and the affirmance of the judgment and writ of possession aforesaid.

The plaintiff further gave in evidence, that the defendant, from the institution of the said action of ejectment, to the execution of the said writ of possession, was in the possession and occupation of the said part of said tract of land.

And the defendant also gave in evidence to the jury, the proceedings on the action for *mesne profits*, brought in Baltimore County Court as hereinbefore mentioned.

Whereupon the defendant, by his counsel, prayed the Court to direct the jury, that the recovery in the said action for *mesne profits* was a bar to the plaintiff's recovery for the trespass alleged to have been committed, and therefore that the plaintiff was not entitled to recover in the present action.

*Martin*, (Attorney-General,) and *Key*, for the plaintiff.

*Hollingsworth* and *Mason* for the defendant. They cited *Run. Eject.* 164, 165, 166, 167.

CHASE, Ch. J. The Court are of opinion, that in an action for the *mesne profits*, the plaintiff recovers damages for the use and occupation of the land, and that a recovery in such action is no bar to an action of trespass, for a trespass committed on the land during the said time for which the recovery was had for the *mesne profits*.

The Court are also of opinion, that the removing of the fence in this case is a trespass, unless it appears to the jury that such removal was necessary for using and cultivating the land, and was made for that purpose.

\* The defendant excepted. Verdict and judgment for the

**405** plaintiff; and the defendant appealed to the Court of Appeals.

The Court of Appeals at June Term, 1805, affirmed the judgment of the General Court.

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GENERAL COURT, MAY TERM, 1803.

GREEN vs. STONE.

A judgment which is for any cause reversed, can have no legal effect whatever.

A count for money had and received will not lie except to recover money retained contrary to equity and right.

Where an administrator gives judgment by confession, which is afterwards reversed, he is not precluded from shewing afterwards the want of assets at that time.

If money be paid on a judgment afterwards reversed, it may be recovered back in an action for money had and received, unless it was equitably due at the time of such judgment or payment; and such action will not be at all affected by the proceedings in the original action. (a)

ASSUMPSIT for money had and received, to recover money erroneously paid by the plaintiff to the defendant. The general issue pleaded.

The plaintiff at the trial, to support the issue on his part, produced a record of proceedings in an action brought in Anne Arundel County Court by the defendant, as administrator of Robert Couden, against the plaintiff as administrator of Anne C. Green, by which it appeared that an action on the case was brought, and an account filed, for sundry articles chargeable in account, commencing in June, 1769, and ending in April, 1774, leaving a balance in favor of the plaintiff in that action of 135*l.* 2*s.* 6*d.* current money. That no declaration was filed, but a judgment confessed by the defendant at March Term, 1786, for the said balance due on the account, with a reference to certain persons to say whether or not there should be interest allowed on the said balance. That the referees returned an award dated in August, 1787, against the allowance of interest. The plaintiff also produced a record of proceedings on a *scire facias* upon the said judgment, and *fiat* thereon in 1794; also two records of proceedings on two writs of error prosecuted in 1798, on the above mentioned judg-

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(a) In *Owings vs. Owings*, 10 G. & J. 267, it was held that *assumpsit* will lie to recover back money paid under a decree, which is subsequently reversed, and that to support the action it is not necessary to prove that the complainant in whose favor the decree was made, (the defendant in the action of *assumpsit*.) actually received the money. He is still liable if payment was made to the assignee of the decree. As to when money voluntarily paid, under a mistake of facts, &c. may be recovered back, see *Baltimore vs. Lefferman*, 4 G. 431; *Lester vs. Baltimore*, 29 Md. 415; *Coal Co. vs. R. R. Co.* 38 Md. 226; *Gunby vs. Sluter*, 44 Md. 287.

ments, of the removal to, and reversals of both of the said judgments, in the General Court at May Term, 1799. (See 4 *Harr. & McHen.* 351, 352.) The plaintiff further proved, that after the judgment on the *scire facias*, he paid to the defendant the sum of 62*l.* 10*s.* 0*d.* current money, in part \* discharge and payment of said judgment, to recover which sum this action was brought. And he also offered to give in evidence, that previously to the original judgment being obtained against him, he had fully administered the personal estate of the said Anne C. Green, except to the amount of 8*l.* 19*s.* 0*d.* current money.

The defendant then offered in evidence to the jury, the account in the record of proceedings first mentioned, with the endorsements thereon, on which the said original judgment was confessed, and the original docket entry of that judgment, with a reference to the arbitrators, and their award, viz. A probat by Mr. Couden on the 19th of August, 1778, and a certificate by the justice who took the probat, that the books, &c. were legally proved, with an endorsement by the register of wills that the account would pass when paid. The entry on the docket was "judgment for principal, and interest referred to," &c. with a copy of the award, saying interest was not to be allowed.

The defendant then prayed the opinion of the Court, and their direction to the jury, that upon the aforesaid facts the plaintiff was not entitled to recover, and that he could not, at this time, be permitted to prove the want of assets to discharge the said debt, for the purpose of entitling him to recover in this action.

*Martin*, (Attorney-General,) and *Shaafl*, for the defendant. Cited *Esp.* 91-96.

*Johnson*, and *Brice*, for the plaintiff. Money paid on a judgment, which is afterwards reversed, may be recovered back in an action of *assumpsit*. *Esp.* 6.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court are of opinion that the judgment obtained by Couden's administrator against Green's administrator, being reversed, became a mere nullity, and ceased to have any operation or effect from the time of the reversal, and that no inference of law can arise from the judgment.

The Court are also of opinion, that the plaintiff cannot recover in this case, unless the defendant's retaining \* the money is contrary to equity and right. That the defendant may resort to any equitable or conscientious defence to repel the claim of the plaintiff, and may show the justice of his original claim; and that the plaintiff may show he had not any assets to pay the debt due from A. C. Green to Couden, and is not in law or justice liable to pay the same; and that the account filed in the cause of 'Couden's administrator against Green's administrator, is not made competent evidence by the confession in the record, the award filed and the rendition of

the judgment so reversed, if, independent of such circumstance, it is not legal evidence.

A judgment reversed becomes mere waste paper, and the rights of the party, immediately on the reversal, are restored to the same situation in which they were prior to the pronouncing of the judgment so reversed.

The defendant excepted. Verdict and judgment for the plaintiff for £150 current money, damages and costs.

The defendant appealed to the Court of Appeals; but the case abated in that Court at November Term, 1804, by the death of the appellant.

### GENERAL COURT, MAY TERM, 1803.

#### WOLF *vs.* RODIFER.

Proof of words spoken in the second person, will not support a declaration in an action of slander laying them in the third person.

APPEAL from Allegany County Court. It was an action of slander, brought by the appellee against the appellant. The declaration charged the appellant with proclaiming, &c. the following false, malicious, and scandalous English words of the appellee, viz. "That he the said Joseph was a thief, and had stolen one pine plank, and that he the said John would prove it." The general issue was pleaded; and the plaintiff, at the trial in the County Court, gave in evidence to the jury, that the defendant, in the presence of the plaintiff, said "you are a thief, for you stole a plank, \* and I can prove it." 410 The defendant prayed the opinion of the Court, and their direction to the jury, that such evidence was not sufficient in law to support the declaration of the plaintiff. But the County Court refused to give the direction prayed, being of opinion that the evidence offered was sufficient. The defendant excepted, and the verdict and judgment being for the plaintiff, this appeal was prosecuted by the defendant.

*Perry*, for the appellant, cited *Esp.* 266; *Bull. N. P.* 5.

*Johnson*, and *Buchanan*, for the appellee.

THE COURT. Let the judgment be reversed.

*Judgment reversed, and precedendo awarded.*

### GENERAL COURT, MAY TERM, 1803.

#### BULL'S Lessee *vs.* SHEREDINE.

Where a sheriff's return on a *feri facias*, and his conveyance of the land sold under it, are apparently regular, the title cannot be divested out of

the purchaser, except by proof of fraud or collusion between him and the sheriff. (a)

EJECTMENT for a tract of land called Preston's Choice, lying in Harford County. The general issue pleaded.

The plaintiff, at the trial, deduced a regular title from the grantee of the land for which the suit was brought, down to Bernard Preston, who on the 25th of September, 1789, conveyed it to Benjamin Preston. That before this conveyance, a judgment was obtained in Harford County Court, at November Term, 1787, by Preston and Johnson, against the said Bernard Preston; upon which judgment a *scire facias* issued against Benjamin Preston as terre-tenant of Bernard Preston, and *fiat* obtained thereon at March Term, 1799. \* That a **411** *feri facias* issued on the last mentioned judgment on the 4th of April, 1799, returnable to the third Monday of August, 1799; at which time the sheriff of the county made a return of the *feri facias*, thereon endorsed, that the property mentioned in the schedule attached to the writ, (which was the land in dispute in this case,) had been sold under the said writ to the lessor of the plaintiff on the 25th of April, 1799. On the 26th of November, 1799, the sheriff, in pursuance of the writ, sale and return, conveyed the said land to the lessor of the plaintiff.

Several depositions of witnesses were read by consent to prove, among other things, that the said purchaser did not comply with the terms of the sheriff's sale of the said land, by paying the purchase money, and that indulgence had been granted to him by the deputy sheriff who made the sale, and by the plaintiffs in the judgment on which the *feri facias* issued.

*Johnson*, for the plaintiff, prayed the Court to instruct the jury.

1. That if the jury should be of opinion that there was a sale made by the deputy sheriff in April, 1799, to the lessor of the plaintiff, of the land mentioned in the declaration, and that it was a fair sale; and that if the deputy sheriff agreed to indulge the purchaser, then the sale so made is valid in law, and the right acquired thereby is not to be affected by any after transaction; and

2. That if the jury should be of opinion that there was a sale made in April, 1799, by the deputy sheriff to the lessor of the plaintiff, of the land mentioned in the declaration, and that the sale so made was a fair sale; and that if the plaintiffs in the judgment and *feri facias* under which the sale was made, or either of them, agreed to indulge the purchaser for a non-compliance with the terms of the sale, then the sale so made is valid in law.—Cited 1 *Dall.* 419.

*Hollingsworth* and *Key*, for the defendant.

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(a) Cf. *Estep vs. Weems*, 6 G. & J. 303.

CHASE, Ch. J. The Court are of opinion, that the lessor of the plaintiff in this case acquired a legal title to the land in question by the sale under the *feri facias*, the return made by the sheriff, and the deed made by the sheriff to the lessor of the plaintiff, pursuant to the return made on the *feri facias*, which title cannot be impeached or defeated, but by proof of fraud or collusion between the sheriff and the purchaser, the lessor of the plaintiff in this suit.

*Verdict for the defendant.*

\* GENERAL COURT, MAY TERM, 1803.

413

TOLLEY'S Lessee vs. FORD.

Where the commissioners appointed to perpetuate the bounds of lands have not been sworn agreeably to law, the deposition of a witness taken by them cannot be read in evidence.

The declarations of a person who is dead, and whose deposition was taken under a commission to perpetuate the bounds of land, defectively executed, may be given in evidence in an action of ejectment by the person who took the deposition as a commissioner, though not legally empowered to administer an oath, and he may turn to the deposition to refresh his memory; but such declarations are not to be received as made on oath.

The declarations and shewings of the patentee of a tract of land, as to the beginning, as located by the party claiming under him, are not legal evidence for the purpose of impeaching the credibility of testimony proving the patentee had at a different time made different declarations and shewed a different place, &c.

EJECTMENT for a tract of land called The Case is Altered, lying in Baltimore County. Defence on warrant, and plots returned.

The plaintiff claimed title to the land in the declaration mentioned under a grant to Walter Tolley, dated the 6th of October, 1782; and the defendant claimed the same land as included in a resurvey on a tract of land called Spanish Oak Bottom, granted to Stephen Onion on the 27th of May, 1745. The question was as to the true location of Spanish Oak Bottom.

1. The defendant at the trial, offered in evidence to the jury a paper purporting to be an original commission issued on the 10th of June, 1782, out of Baltimore County Court, under the Act of 1723, ch. 8, to Robert Long, Isaac Griest and James Baker, the commissioners therein named, to perpetuate the bounds of the tract of land called Spanish Oak Bottom. By the return to the commission it did not appear that the commissioners had been sworn in the manner directed by the commission. The defendant offered in evidence by James Baker, one of the commissioners named in the said commission, that he was sworn in the manner as is certified by the endorse-

ment on the commission, and that Long, Griest and himself, the three persons named in the said commission, being together, a certain Richard Woolin, now deceased, upon an oath by the said Long, Griest and Baker, to him administered, under the authority or pretence of authority of the said commission, gave the evidence contained in the paper now produced, purporting to be a deposition of the said Woolin; which evidence and information they the said Long, Griest and Baker, then caused to be reduced to writing in the presence of the said Woolin, and which said paper contains a true and just account of the whole information and evidence of the said Woolin respecting the boundary therein mentioned, and which the said Woolin then signed in the \* presence of the said Long, **414** Griest and Baker, who have thereto signed their names respectively. And the defendant offered to read the contents of the said paper in evidence to the jury. To the reading of which said paper the plaintiff objected.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court are of opinion, that the paper purporting to be the deposition of Richard Woolin, cannot be read in evidence to the jury. The Court think, that James Baker (one of the commissioners and the witness produced,) was not authorized to administer the oath to Woolin. The declarations of a person who is dead, whose deposition was taken under a commission defectively executed, may be given in evidence by the person who took his evidence as a commissioner, though not legally empowered to administer an oath, and he may turn to the deposition to refresh his memory; but such declarations are not to be received as made on oath.

The case of *Weems vs. Disney*, (4 *Harr. & McH.* 136,) was different from the present case. There the commissioners were legally qualified, and they had authority to take the deposition, and the witness, (one of the commissioners,) swore that the deposition was taken before him. The defect in the execution of the commission was for want of shewing how the commissioners had given the notice.

The defendant excepted.

2. The plaintiff gave in evidence to the jury, that a certain John Bond, now deceased, had heretofore in his life-time shewn the place marked on the plots black K, as the place where stood the beginning tree of the tract of land called Spanish Oak Bottom, as located by the plaintiff, the said John Bond declaring at the time when he shewed the said place, that he derived his knowledge thereof from a certain Stephen Onion, deceased, the patentee of the said land, who had shewed the said place of beginning to the said John Bond as the place where stood the said beginning, \* under **415** which said Stephen Onion, it was admitted, the defendant by mesne conveyances directly claimed title to the said land. The defendant gave in evidence that the said John Bond, at the time of



his shewing the said beginning of Spanish Oak Bottom, was a person advanced in years; that his mind and memory were impaired by age and calamity; that he had been afflicted with temporary derangements in his understanding; that he was liable to be influenced by the suggestions of others, and that his recollection of transactions some time past was not to be relied on; and for the purpose of further impeaching the credibility of the said John Bond's testimony, the defendant also offered in evidence that the said Stephen Onion had claimed and exercised ownership over the said tract of land called Spanish Oak Bottom, as located by the defendants, and that the said Onion had frequently, at other times than that mentioned by the said John Bond, to divers credible and competent witnesses shewed the beginning of the said tract of land called Spanish Oak Bottom, at the place where the same was located by the defendant, and had not held or occupied the said land as located by the plaintiff.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court are of opinion, that the declarations and shewings of Stephen Onion, last mentioned, as to the beginning of the tract of land as located by the defendant, are not legal evidence to the jury for the purpose intended, under the general rule that no one can give evidence for himself. The defendant excepted.

*Hall, Key, Mason, and Johnson*, for the plaintiff.

*Martin*, (Attorney-General,) and *Hollingsworth*, for the defendant.

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\* GENERAL COURT, MAY TERM, 1803.

416

HARRIS *vs.* DORSEY.

If the amount of an award in favor of a plaintiff on a reference from the Court be at the time of awarding, less than the Court has jurisdiction over, there must be judgment of *non-suit*, though at the time of entering such judgment, such sum, with the interest added to it, would be sufficient to support the Court's jurisdiction.

THIS case had been some time before referred to arbitrators, who had awarded a less sum in favor of the plaintiff, than the jurisdiction of the Court extended to. The award remained in Court unacted upon until this term, when,

*Shaaff*, for the plaintiff, moved to have judgment entered on it for the plaintiff, on the ground that, although the sum awarded did not at the time of awarding amount to a sufficient sum to support the Court's jurisdiction, yet that it would at this time, with the interest calculated on it.

But the Court directed a non-suit to be entered.

## GENERAL COURT, MAY TERM, 1803.

## FISHER vs. THE STATE, use of JOHNSON.

Where there is an award returned in favor of the plaintiff in an action of debt on bond, the judgment must be entered for the penalty of the bond, &c.

A writ of *diminution* granted to correct a judgment entered for the sum awarded in action of debt on bond, instead of being entered for the penalty of the bond, &c. (a)

**ERROR** to Harford County Court. It was an action of debt upon a bond, which had been referred by the County Court to arbitrators, who awarded a particular sum to be due, and for which sum the Court entered judgment.

*Johnson*, for the defendant in error, stated that the judgment had been incorrectly entered by the County Court. That it ought to have been for the penalty of the bond, or amount of the debt for which the suit had been brought, and costs, to be released on payment of the sum awarded. He moved, under the authority of the case of *Duvall vs. Wells*, (4 H. & McHen. 163,) for a writ of diminution to the County Court, that the judgment might be corrected, and a proper record transmitted to this Court.

*Hall and Hollingsworth*, for the plaintiff in error.

*Writ of diminution granted.* (b)

## 417 \* GENERAL COURT, MAY TERM, 1803.

## CONTEE vs. CHEW's Executor.

Where the State and an individual have judgments against a deceased person, in the payment of the debts of the deceased by his executor, the judgment by the State has a preference, and is to be paid first. (c)

**SCIRE FACIAS** upon a judgment obtained against the testator in his life-time at May Term, 1799. The defendant pleaded a prior judgment obtained by the State of Maryland against the testator in his life-time, at May Term, 1797; that he had no assets in his hands more than sufficient to pay the debt due to the State upon the said judgment, and that the said assets were liable to the exclusive pay-

(a) See *Duval vs. Wells*, 4 H. & McH. 113, note.

(b) The County Court returned a record of the judgment so amended, which was afterwards affirmed at October Term, 1804.

(c) Approved in *Orem vs. Wrightson*, 51 Md. 42, and in *State vs. Bank*, 6 G. & J. 226. See *State vs. Rogers*, 2 H. & McH. 125, note.

ment and satisfaction of the debt due to the State, &c. General demurrer to the plea. Joinder in demurrer.

*Duckett*, for the plaintiff.

*Johnson*, for the defendant.

The General Court overruled the demurrer, and gave judgment for the defendant. See 2 *Harr. & McHen.* 198; 3 *Harr. & McHen.* 171.

### GENERAL COURT, MAY TERM, 1803.

#### BERRY'S Lessee vs. BERRY.

In the construction of wills, the intention of the testator is to prevail; but that intention must accord with the rules of law, and is to be collected from the words of the will only. (a)

The heir at law is not to be disinherited without express words or necessary implication. (b)

Where A. devised to S. "all the land I hold, or claim right to, on the W. side of a small drain that leads from the pond—also the land over said drain lying on Piney Branch, formerly called Pork Hall and Bachelor's Delight, lying in Charles County, to him and his heirs lawfully begotten of his body forever," it was *held*, that the words "lying in Charles County," constitute part of the description of the last mentioned tracts, and do not limit the operation to the first part of the devise; that the words "to him and his heirs," &c. define the estate the devisee is to have in the lands, and are as applicable to the first part of the devise as the last, and that S. took an estate tail in all the lands devised to him; and that "on the W. side of the drain," mean all the lands on the W. of a meridian N. line extended from the pond.

EJECTMENT for part of a tract of land called Aix, lying in Prince George's County. Defence on warrant, and plots returned.

The plaintiff offered in evidence a grant to William Hutchison, dated the 12th of June, 1688, for the land called Aix mentioned in the declaration; and that Thomas Berry, of Samuel, was on the 24th of October, 1778, and at the time of his death, seized in fee of the part of the said tract for which this suit is brought. That Humphrey Berry was heir at law of the said Thomas, and that the said Humphrey died since the Act to direct descents passed in 1786, leaving Samuel, John, Prior, Thomas, Benjamin, James Smallwood, \* and Henry Moore Berry, his sons and heirs at law. That the 418 said heirs, on the 29th of August, 1798, executed a lease on the premises, to Henry Moore Berry, the lessor of the plaintiff, for the land for which this suit is brought. That the said Thomas Berry of

(a) Approved in *Walston vs. White*, 5 Md. 803.

(b) So held in *Creswell vs. Lawson*, 7 G. & J. 227; *Ridgely vs. Bond*, 18 Md. 437; *Saylor vs. Plaine*, 31 Md. 158.

Samuel, died seized in fee of the land mentioned in the declaration, being part of Aix, lying in Prince George's County, and of part of a tract of land called Hull, and of a tract of land called Pork Hall Enlarged, lying in Charles County.

The defendant offered in evidence the will of the said Thomas Berry of Samuel, dated the 24th of October, 1778, wherein are contained the following devises, viz: "*Imprimis*.—I hereby order and direct that all my legal debts be paid and satisfied, &c. *Item*.—I give and bequeath unto my well beloved aunt, E. B. one crop hogshead of tobacco. I give and bequeath unto my well beloved aunt, Ann Berry, during her natural life, or until her marriage, 40 acres of land, to be laid out where she now dwells. *Item*.—I give and bequeath unto my well beloved cousin, John Berry, son of Humphrey, a bay horse, &c. *Item*.—I give and bequeath unto Ann Conner, wife of Richard, during her natural life, or until marriage, the dwelling house she is now about building, and ground enough round the same for a garden and cotton patch, and to have liberty of getting fire-wood on the upper part of the land without committing waste. *Item*.—Whereas I have agreed to rent a certain William Smallwood of John, the upper part of my plantation, I hold in Prince George's County, for the quantity of 950 lbs. crop tobacco, clear of cask; it is my will that he shall have the said place, conditionally he behaves himself as a tenant ought to do; he is not to make use of any more land than what lies above the place where Ann Conner now has a cotton patch, except it be fire-wood and rail timber, which he must get in the swamp, except when prevented by bad weather. The lower part of the plantation I mean to have reserved for the use and support of the plantation where I now dwell. *Item*.—It is

**419** \* my will that Charles Innis shall have 100 acres of land laid off where he now dwelleth, and to remain on it as a tenant upon the same terms he has done heretofore. *Item*.—I give and bequeath unto Samuel Berry Atchison, son of Mary Eleanor Atchison, all the land I hold or claim right to on the west side of a small drain that leads from a place called and known by the name of Duck Pond; also the land over said drain, lying on Piney Branch, formerly called Pork Hall and Bachelor's Delight, lying in Charles County, to him and his heirs lawfully begotten of his body for ever; and if he should die without issue, it is my will that the said land should be sold at public vendue, and the money or tobacco arising therefrom to be distributed amongst the poor at the discretion of my executor. I also further give unto the said Samuel Berry Atchison the following negroes, &c. them and their increase, to him and his heirs lawfully begotten of his body for ever; and if he should die without issue, it is my will that my said negroes should be sold at public vendue, and the money or tobacco arising therefrom to be distributed amongst the poor at the discretion of my executor. I also further leave unto the

said Samuel Berry Atchison, all the rest of my personal estate that shall be remaining at the time he comes to the age of 21 years. In the mean time it is my wish that my executor shall keep my building, and all the rest of my improvements, in good repair, and keep together all the rest of my estate, so as not to have it wasted, and to be by him delivered to the said Samuel Berry Atchison; and in case he should die without issue, to be sold and distributed in the same manner as directed for the land and negroes. It is my will that Mary Eleanor Atchison, mother of the said Samuel Berry Atchison, will let my executor hereafter mentioned have the care and bringing up of the said Samuel Berry Atchison, whom I desire to put to school, and have taught as far as he my executor should think proper, the expense of which to be deducted out of my estate. *Item.*—It is my will that Benjamin Cawood, Junior, have all the land I hold or claim right to on the east side of a small drain that leads from a place called and known by the name of \* the Duck Pond, where he the said Benjamin Cawood now dwelleth, at the **420** price of 50s. common currency per acre; and in case the said Cawood should not think proper to purchase the same, it is my will that the said land be sold at public vendue, and the money arising therefrom to be distributed amongst the poor at the discretion of my executor. And I make, constitute and ordain, my good friend Benjamin Cawood, Junior, to be my executor, to manage and keep my estate together until the aforementioned Samuel Berry Atchison arrives to the age of 21 years, then for my said executor to deliver up all the real and personal estate, I have willed to the said Samuel Berry Atchison; and it is further my will that my said executor shall collect and sell all the tobacco I have now due, or shall have hereafter due me for the rents of my land, for cash, and distribute the same amongst the poor at his discretion; and it is my will, that all that should be to spare at any time, exclusive of sufficient to support the negroes and stock, and other necessary expenses, shall be sold for the use of the poor in manner aforesaid. In witness," &c.

It was admitted that the part of the land called Aix, which is shaded red on the plots, is the part which was claimed by Thomas Berry, the testator; and that the tracts of land called Hull and Pork Hall Enlarged, constituted the dwelling plantation of the testator, so far as the same is located on the plots in black lines shaded yellow, and that the house within the line shaded yellow, was the dwelling house of the testator, and that the said house is on the tract of land called Hull; and that Pork Hall Enlarged is a resurvey on Pork Hall and Bachelor's Delight.

*Shaaff*, and *Buchanan*, for the plaintiff.

*Martin*, (Attorney-General,) and *Key*, for the defendant.

CHASE, Ch. J. delivered the opinion of the Court. The rules which have been adopted in the construction of wills are well esta-

**421** blished, and when conformed to \* generally lead to a right decision of all litigated questions arising under them.

The intention of the testator is to prevail; but that intention must accord with the rules of law, and is to be collected from the words of the will.

The heir at law is not to be disinherited but by express words or necessary implication.

Intention, without words from which that intention can be inferred, operates nothing.

The right of the heir at law is presumptive, and devolving on him by operation of law, cannot be defeated or impeached by vague surmise of what the testator intended to do, or unfounded opinion of what, in his situation, he ought to have done.

If the words of a will are capable of two constructions, the Court will adopt that which will best effectuate the intention of the testator, manifested by the words of his will.

Upon reading and considering the will of Thomas Berry, it is apparent that he intended to disinherit his heir at law, and to deprive him of every part of his estate. It is also obvious that Samuel Berry Atchison was the primary and chief object of his bounty.

There is no dispute about the quantum of interest which passed to the devisee; the only contest is as to the land which is devised by the testator to Samuel Berry Atchison.

According to the admission of counsel, the plots and evidence in the case, part of the lands held and claimed by the testator at the time of making his will, lay in Prince George's, and the other part in Charles County, part on the west and part on the east side of a drain leading from the Duck Pond in a north and south direction to Piney Branch.

It also appears that part of the land called Pork Hall Enlarged, being a resurvey of the lands mentioned in the will and called Pork Hall and Bachelor's Delight, exclusive of what is devised to Benjamin Cawood, lay on the east side of the drain from the Duck Pond.

**422** The devise to Samuel Berry Atchison is as follows: \* "I give and bequeath to Samuel Berry Atchison all the land I hold or claim right to on the west side of a small drain that leads from the Duck Pond—also the land over said drain, lying on Piney Branch, formerly called Pork Hall and Bachelor's Delight, lying in Charles County."

This then is the description of the lands which the testator intended should pass. There are two parts in this description. The first, preceding the word "also," comprehends all the land the testator held on the west of the drain. This did not fully effectuate the intention of the testator; for it is plain from the words of the will, that he intended Samuel Berry Atchison should have that part of Pork Hall Enlarged, lying on the east of the drain which is not included in the devise to Benjamin Cawood, being the small piece at the south end

of the tract described by the letter L on the plots. The latter part of the description passes that piece to the devisee, and was necessary to give full effect to his intention.

The words "lying in Charles County," constitute part of the description of Pork Hall and Bachelor's Delight, and do not limit the operation of the first part of the devise.

The words "to him and his heirs lawfully begotten of his body," define the estate he is to have in the lands, and are as applicable to the first part of the devise as the last.

According to the plain meaning and import of the words used in this devise, Samuel Berry Atchison, took an estate tail in all the lands on the west side of the drain held by the testator, or to which he claimed a right, and to that parcel of Pork Hall Enlarged described by the letter L on the plots, subject to the temporary estates or qualified interest in the land devised to others.

The question now occurs, what lands lie on the west of the drain according to the meaning of the words used by the testator?

In the opinion of the Court, according to the plain meaning and common acceptance of the words "on \* the west side of the drain," it was the manifest intention of the testator that all the lands which lay on the west of a meridian north line extended from the Duck Pond, should pass to the devisee Samuel Berry Atchison. The testator, by the words "west of the drain" described the general bearing of the land, with the reference to the Duck Pond and the drain issuing from it.

*Plaintiff non-suited.*

# CIRCUIT COURT OF THE UNITED STATES FOR THE MARYLAND DISTRICT, MAY TERM, 1803.

## THE BANK OF THE UNITED STATES *vs.* NORWOOD.

The agent of a corporation need not be appointed by deed. (a)

Where the endorser of a promissory note lived seven miles from Baltimore, which was his nearest post-office, and on the day on which the note was protested a notice thereof, directed to the endorser, was mailed in Baltimore and it was proved that such notice was given according to the custom of Baltimore, it was held to be sufficient to charge the endorser. (b)

The notice of the dishonor of a note need not expressly state that the holder looks to the endorser for payment. It is sufficient if the fact of non-payment, and that the holder looks to the endorser for payment can be reasonably inferred from the terms of the notice. (c)

(a) See *Bank vs. Ridgely*, 1 H. & G. 324.

(b) Approved in *Bell vs. Bank*, 7 G. 225, where it is said that the particular custom of the place is made to decide the question as to the manner of giving notice. Cf. *Bank of Col. vs. Magruder*, 6 H. & J. 172.

(c) No precise forms of words is necessary to be used in giving notice to an endorser, but the notice should contain, either expressly or by a just im-

ASSUMPSIT on a promissory note drawn by Stone, Vaughan & Co. in favor of the defendant, and by him endorsed to the plaintiffs. This note was what is called an accommodation note, and the defendant endorsed merely to enable the drawers to obtain money on it from the bank, and the defendant knew that the drawers meant to obtain the money from the plaintiffs.

The following facts appeared in evidence. The note was presented for payment to the drawers, who refused to pay it, and it was on the same day protested by Samuel Sterett, a notary public, and a letter to the defendant informing him that the note was protested for non-payment was put into the post-office on the same day. The defendant lived seven miles from the City of Baltimore, and the post-office in the said city was the nearest post-office to the house of the defendant.

Mr. Sterett proved that he was agent to the bank for the purpose of presenting notes for payment, and that it was his invariable custom, whenever a note was refused payment, to protest it, and give notice of the protest in person to the indorsers, if they lived in the city, and if they lived in the neighborhood to put a letter in the post-office informing them of the protest \* for non-payment. The  
**424** penny post does not deliver letters to any person residing out of the city. The drawers were known by the indorser to be insolvent at the time of the indorsement.

*Key*, for the defendant, objected. 1. That the manner of sending the notice is not sufficient. 2. But admitting that this mode of giving notice should be considered sufficient, yet the form of notice is in itself deficient. The notice only states that the note is protested for non-payment. The law requires that the notice should not only inform the indorser of the non-payment of the note, but also declare that the holder discharges the drawer, and looks to the indorser for payment. *Kyd*. 125; *Lovelace*, 161, 165; *Tindall vs. Brown*, 1 T. R. 167.

3. That Samuel Sterett having no authority by deed from the bank to demand the money, was therefore not legally authorized to receive it, and consequently no notice from an unauthorized person  
**425** can be sufficient. \* 1 *Salk*. 191; 3 *Salk*. 103; 4 T. R. 170.

plication, 1st. A description of the note so as to ascertain its identity. 2nd. A statement that it was duly presented for payment, at the proper place, on the day of maturity and was dishonored. *Graham vs. Sangston*, 1 Md. 59; *Reynolds vs. Appleman*, 41 Md. 615; *Bank vs. Brooke*, 31 Md. 7; *Wetherall vs. Clagett*, 28 Md. 465; *Hunter vs. Van Bomhorst*, 1 Md. 504. The engagement of the endorser of a note is conditional, and any neglect or laches on the part of the holder in not making due presentment thereof, or in not giving due notice of its non-payment, will discharge the endorser. *Bank vs. Carson*, 50 Md. 18. The law does not require actual notice to the endorser of the dishonor of the note, but only the exercise of due diligence on the part of the holder to give such notice. *Reier vs. Strauss*, 54 Md. 278.



*Hollingsworth*, (District Attorney) and *Martin*, (Attorney-General of Md.) for the plaintiff, cited 3 *P. Wms.* 419.

THE COURT took until the next day to consider the objections, when the opinion was delivered by

CHASE, J. (WINCHESTER, D. J. concurred.) From indisposition I have not been able to give this case so full a consideration as I wished. We have, however, considered it so far as to have formed a decided opinion.

It has been objected that the plaintiffs, being a corporate body, cannot act by agent without authority by deed. This objection has no force. The bank may act as a natural person.

As to the manner of giving notice, it might be questionable whether the simply putting the letter in the post-office would be sufficient if there were no other circumstances in the case. But there are other facts which have determined the opinion of the Court, \* that there has been sufficient and legal notice. The custom of the place decides the question. This custom too was known 427 to the defendant. When an engagement is made, it is subject to the usage and custom of the place where it is made respecting such engagement.

The notice is in itself sufficient—it amounts, under the circumstances of this case, to the fullest notice contended for by the defendant's counsel—not only that the note is not paid, but that he will be looked to for payment—any thing which shews that the holder does not mean to give credit to the drawer is sufficient notice to the indorser. In this case it was known that the drawers were insolvent at the time of the endorsement, and the indorser therefore undertook to pay at all events. The protest, although not required by law, and therefore of itself not sufficient notice, is however not totally idle. It is a paper from the agent of the bank, and from the usage of the place imports that the bank looks to all parties concerned for payment of the note, and the defendant had notice that this protest was made.

The Court are of opinion, that the defendant has had legal and sufficient notice of the default of the drawers.

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CIRCUIT COURT OF THE UNITED STATES FOR THE  
MARYLAND DISTRICT, MAY TERM, 1803.

THE UNITED STATES *vs.* VICKERY.

A failure to prove an unnecessary averment in an indictment will not vitiate it.

Where the indictment charged that the prisoner was employed in transporting slaves from Martinique to Cumana, and the evidence produced was

that he transported the slaves from Nevis to Cumana—*Held*, that the indictment, being in the words of the statute, is sufficient without any averment of the place, which was unnecessary and mere surplusage, and that proof of the transportation from Nevis supported the indictment.

Where a statute directs a fine and imprisonment to be imposed for an offence, the Court are bound to inflict both, if the party is found guilty.

THIS was a criminal prosecution under the Act of Congress passed the 10th of May, 1800, which subjects all persons voluntarily serving on board any vessel of the United States, which is employed in transporting slaves from one foreign place to another, \* to fine and  
**428** imprisonment. The indictment stated, that Vickery voluntarily served on board a certain schooner belonging to a citizen of the United States, as master, which schooner was employed in transporting nine negro slaves from one foreign place to another, to wit, from the island of Martinique, in the West Indies, to Cumana in South America. The evidence produced on the trial proved the voluntary serving on board the said schooner, which was employed in transporting nine negro slaves from Nevis to Cumana, and not from Martinique.

*Purriance*, for the prisoner, supported by *Harper*, moved the Court to direct the jury, that the proof offered did not support the indictment. The indictment charges the transportation from Martinique, and the proof is of a transportation from Nevis.

\* *Hollingscorth*, (Attorney of the United States for the  
**429** Maryland District,) contended that the averment was unnecessary, and merely surplusage, and therefore it could not be necessary to prove it.

WINCHESTER, J. The indictment being in the words of the statute, is sufficient without any averment of the place which is unnecessary and mere surplusage. A failure to prove an unnecessary averment cannot vitiate an indictment which was good without the averment. It would be no contradiction of the record on an indictment for a transportation from Nevis, to prove that it is the same offence as the transportation from Martinique charged in the present indictment, for that is surplusage, and the transportation from one foreign place to another, which is the substantial part of the indictment, would not be contradicted. The Court are of opinion that the proof of a transportation from Nevis supports the present indictment.

The proof being unequivocal as to the transportation from Nevis to Cumana, the jury found a verdict of guilty without retiring. The Court were satisfied, from all the circumstances of the case, that the prisoner was ignorant that he was committing a violation of any law, and therefore fined him only ten dollars, and imprisoned

him twenty-four hours. The Court were disposed only to have imposed the fine, but upon looking at the law they were of opinion, that they were obliged to inflict both.

\*COURT OF APPEALS, JUNE TERM, 1803. **430**

B. & A. C. BROWNE *vs.* R. BROWNE *et al.*

A Court of equity will carry into execution what appears to have been a kind of family compact for settling their property on a fair and reasonable footing.

Where the consideration of natural love and affection was held to be such a consideration as entitled a grantee to the aid of a Court of equity to supply the defect in a defective conveyance to convey land, although such consideration was not expressed in the conveyance. (a)

A father being seised of considerable real estate agrees not to devise it, but let it descend to his eldest son and heir at law, with an understanding and agreement with such son, that should he (the son) afterwards get title to another estate, then belonging to a third person whose devisee he expected to be, that he would then convey the estate so descended to him from his father, to his younger brothers. If after the father's death the son does get title to the estate of such third person, and executes, in pursuance of said agreement with his father, a conveyance to his brothers of the estate descended from his father, which conveyance proves to be defective, equity will remedy such defect. (a)

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint of the appellants.

The bill, which was filed on the 4th of March, 1797, states that a certain James Browne of Glasgow, in Scotland, being seised and possessed of a tract of land called "Meagreholm," containing 608 acres, lying in Queen Anne's County, of one other tract of land called "Ashley," containing 95 acres and one-half, adjoining to the first mentioned tract, and of one other tract of land called "Hobb's Venture," containing 281 acres, lying in Caroline County, and intending to convey the same to his brothers Basil Browne and Bennett Browne did on the 25th of July, 1777, duly make and execute a deed poll or instrument of writing for that purpose, and in which is contained a covenant binding the said James, and his heirs, to execute any further deed or assurance that may be necessary for the more effectually conveying the said lands to his said brothers, and their heirs, as tenants in common. That the lands contained in the said deed formerly belonged to a certain Charles Browne, who died,

(a) As to the specific performance of contracts to devise real estate, or to do anything in consideration of a devise, &c. see *Owings' Case*, 1 Bland, 370; *Mundorff vs. Kilbourn*, 4 Md. 459; *Whitridge vs. Parkhurst*, 20 Md. 84; *Frisby vs. Parkhurst*, 29 Md. 58; *Semmes vs. Worthington*, 38 Md. 298; *Simmons vs. Hull*, 4 H. & McH. 164.

leaving issue the said James Browne, his heir at law, and the said Basil and Bennett his younger children. That a certain Andrew Cochrane was also possessed of a large estate in Britain, and it was agreed between the said Charles Browne and the said James Browne, his heir, that the said Charles should leave the estate mentioned in the said deed to descend unto him the said James, without devising the same, or any part thereof, upon this express trust and confidence, that in case the said James should succeed to the estate of the said Andrew Cochrane, that then he the said James would convey the lands, which are specified in the said deed, unto them the said Basil and Bennett Browne. That the said James did afterwards succeed to the estate of the said Andrew Cochrane, and in conformity with the said \* agreement with his father executed

**431** the deed before mentioned, which agreement, together with the natural love and affection he bore his two brothers, constituted the true consideration of the said deed. That said deed not being indented, acknowledged, or recorded agreeably to the directions of the laws of this State, did not operate to pass the legal title of said lands to the said Basil and Bennett, and that said James soon after, in 1778, died, never having been married, whereby the legal title to said lands descended unto his eldest brother Robert Browne, late of Queen Anne's County; but that said Basil and Bennett entered into and were possessed of said lands in virtue of said deed. That said Bennett afterwards, on the 1st of August, 1788, made and duly executed his last will and testament, and thereby authorized his executors to sell said lands, if they should in their discretion find it necessary and proper, and if not he devised his moiety unto the complainants. That Basil also by his last will and testament, bearing date the 13th of September, 1794, devised all his real and personal estate unto Basil Browne, one of the complainants. That both Bennett and Basil died without altering or revoking their said respective wills; and that Robert, the eldest brother of said Bennett, and the heir at law of said James, hath also died, leaving Charles Browne, (now of age,) Basil, Robert, and Sarah Browne, his children, to whom the legal title of the said lands have descended; but that the said Robert, by his last will and testament dated the 28th of May, 1787, devised the said lands to be sold by his executors (Richard B. Carmichael and Sarah Browne,) for the payment of his debts. The complainants also state, that they have been informed, but cannot certainly declare, that the said James, in his life-time, after the execution of the said deed, duly made his last will in writing, and devised all his estate to his mother Priscilla Browne, then resident of Queen Anne's County, who afterwards also duly made her last will in writing, and devised the same, including the legal title in the

**432** lands mentioned in the said deed, to Elizabeth the wife \* of Alexander Lawson, now of Baltimore County, (two of the

defendants,) and they pray that the defendants may discover the truth thereof. That said Sarah died before Robert, and that Richard B. Carmichael renounced the said trust, and letters of administration with the will annexed of the said Robert were granted unto William Richmond (one other of the defendants;) and forasmuch as the complainants have no means of obtaining the legal title to the said lands but by the aid of this Court, and the rather as the children of the said Robert, who are the heirs of the said James, and bound to fulfil his covenant for further assurances, and to whom the legal title of said lands has descended, are infants under the age of 21 years, except Charles. To the end, &c. that the defendants may answer, &c. and that said lands may be conveyed to the complainants by the children of the said Robert, or by their guardian to be appointed by this Court for that purpose, and such estate vested in the complainants in the same as they respectively claim and are entitled to under the wills of the said Bennett and Basil, and that they may have such further and other relief, &c. prayer for *subpoena*, &c.

The answers of the infants, by their guardian, state, that they have no knowledge of any of the matters and things in the said bill of complaint stated but from information, &c. and the answers of the other defendants admit the facts stated in the bill. That they have no knowledge of any will being made by the said James Browne. That Priscilla Browne executed her last will and testament, dated the 29th of July, 1778, which they exhibit, by which she devised the said lands to her daughter Elizabeth the wife of Alexander Lawson, during her natural life, &c.

The exhibits were—the deed poll dated the 25th of July, 1777, which is as follows, to wit:—"To all to whom these presents shall come. Be it known to you, that I, James Browne, the younger, of the City of Glasgow, North Britain, merchant, lawful son of Charles Browne of Wye, in Maryland, merchant, deceased.—Whereas the said deceased Charles Browne \* did, some time before his death, signify to me his inclination that if I should succeed at any time to the estate of Andrew Cochrane of the City of Glasgow aforesaid, merchant, now deceased, upon that event's taking place that I should convey and make over to Bennett Browne and Basil Browne, my two brothers-german, equally betwixt them, all such plantations, lands, tenements and hereditaments, situate and being within the Colony of Maryland, as I should succeed to in virtue of the decease of him the said Charles Browne. And whereas the said Andrew Cochrane has lately deceased, having left me his whole estate real and personal, with the burthen of paying the jointure to his widow, and a few legacies, and that I am willing to fulfil the inclination of my said deceased father; therefore know ye, that I the said James Browne, have granted, bargained, aliened and confirmed, and in and by these presents do grant, &c. unto the said Bennett Browne, and Basil Browne, equally betwixt them, and to their heirs and

assignees, all those my plantations, &c. within the Colony of Maryland, to which I succeeded upon the death of my said father, and also the whole horses, &c. &c. To have and to hold the said plantations, &c. unto the said Bennett Browne and Basil Browne, and their heirs, to the use and behoof of them the said Bennett Browne and Basil Browne, equally betwixt them, and their heirs and assignees, for ever, &c. And I the said James Browne, do hereby bind and oblige myself, my heirs and successors whomever, and covenant, promise and engage, to and with the said Bennett Browne and Basil Browne, that I and my heirs shall and will, from time to time, and at all times hereafter, upon the reasonable request, and at the costs and charges in law of the said Bennett Browne and Basil Browne, their heirs or assignees, do make, execute and acknowledge, or cause to be done, made, executed and acknowledged, all and every such further and other lawful and reasonable act and acts, deed and deeds, devise and devises, in law whatsoever, for the further and better assurance

**434** and conformation of all \* and singular the said plantations, &c. hereby granted, or intended so to be, with their and every of their appurtenances, unto the said Bennett Browne and Basil Browne, their heirs and assignees, for ever, as by them, or their counsel learned in the law, shall be reasonably devised, advised or required. In witness," &c. Signed and sealed by the said James Browne, Junr. in the presence of three witnesses, one of whom was a notary public. On the back of the said deed was the certificate of Robert Donald, Esquire, lord provost and chief magistrate of the City of Glasgow, certifying and attesting, under the seal of the said City of Glasgow, that on the 29th of July, 1777, personally came and appeared, before him, "John Maxwell, notary public, residing in Glasgow, who upon his great and solemn oath doth depose and say, that he was present alongst with John Shanks and James Allen, and did see the within named and designed James Browne, sign, seal, and as his proper act and deed deliver the within deed of conveyance, and that in testimony thereof the said John Shanks, James Allen, and this deponent, did set and subscribe their names thereto as witnesses; and this deponent saith, that the name James Browne, Junr. appearing to be set thereto as the party executing, is of the proper hand-writing of the said James Browne; and that the names John Shanks, James Allen, and John Maxwell, appearing to be set as witnesses, are of the proper and respective hand-writings of the said John Shanks, James Allen, and this deponent."

The other exhibits appear as they are set forth in the bill and answers.

It was agreed between the counsel for the parties, "that James Browne executed the deed mentioned and exhibited in the bill; that the said James died and left Robert Browne, his eldest brother and heir at law; that the said Robert also died and left Charles, Basil, Robert and Sarah Browne, his children, his heirs at law. It was also

admitted, that the said Basil, the son of the said Robert, died since the filing of the bill, and that William Richmond is administrator of the said Robert as stated in the bill."

\* HANSON, C. (7th March, 1799.) "The case of the complainants, if they cannot succeed, is a hard one. It is always **435** to be wished that what appears to have been a kind of family compact for settling their property on a fair and reasonable footing, should be carried into execution. But if the complainant's counsel are acquainted with any decision or precedent which may authorize a decree according to their wishes, it is necessary for them to apprise the Chancellor where the case is to be found. Many are the cases of disappointment and hardship sustained in consequence of the neglect or failure of persons to execute deeds, or other instruments, for carrying their known and avowed intentions into effect; and the power of this Court, although it has gone as far as possible without directly infringing the Statute of Frauds and perjuries, and disregarding legal principles, has certain legal and reasonable limits beyond which it can never go.

The claim of the complainants rests entirely, as it seems, on what they call a covenant in James Browne's deed, for further assurances. But was the consideration expressed in that deed such as may be deemed a valuable or valid one? Did this Court ever oblige a man to do that which without any such consideration he has, by writing under seal, said he covenants to do, for a person who has neither covenanted to do any thing on his part, nor even signed the writing? Suppose James Browne were now alive, a citizen of Maryland, and seized of the lands in question, would this Court, on the application of the representatives of Basil and Bennett, the grantees, compel him to convey in conformity to the said covenant? Has it ever been understood that this Court, as a thing of course, obliges a man to do whatever he has by writing engaged to do? No—so far from it, this Court does not enforce an agreement without a proper consideration, and there are even cases where an agreement has been made with a proper consideration, and has been fair and unexceptionable in every respect, and yet, on account of some after circumstances, this Court has refused to enforce it.

\* The Chancellor offers these remarks to the counsel in order that they may, if possible, remove the difficulties in their **436** way."

The cause having been afterwards argued by the complainants' counsel, the Chancellor, on the 28th of November, 1799, decreed as follows: "That he has again carefully read and considered all the proceedings, as well as the written arguments. Conceiving the question of vast importance, not only to the complainants, and those interested under Robert Browne, but to the community likewise, and having no aid from the counsel of any of the defendants, he has

bestowed a laborious attention on the subject. The result of his researches and reflections is an opinion that the relief prayed by the bill is unauthorized by any former decision, would be contrary to the last and best authorities, would be repugnant to law, and might afford a dangerous and mischievous precedent.

The relief is prayed on two grounds—A defective conveyance to be aided—An agreement to be enforced.

In one respect, at least, this Court considers a defective conveyance, and an agreement to convey, in the same light. In each of them it requires a valid consideration as essential. Indeed, in the case of an agreement, a good, a valuable, or even adequate consideration, is not always sufficient; but the Court determines, on a view of all the circumstances, whether or not it will exercise its discretion in decreeing a conveyance.

The complainants certainly cannot be in a better state than they would be in if James Browne were now alive, seized of the lands in fee, and the defendant in this cause.

It appears to the Chancellor that the void deed made by James Browne, and the covenant (as it is called,) contained in that deed, must be considered as merely voluntary; that is to say, they were made from the impulse of his own will alone, and not in consequence of a previous agreement with any person whatever, and therefore this Court would not have interfered to control his will.

**437** \* The estate of Cochrane did not come to James Browne from the complainants, or their father, uncle or grandfather, and it is not even suggested that Cochrane gave James Browne the said estate on the condition, or with a request that he should convey to his two younger brothers the lands which his father Charles Browne should suffer to descend to him in Maryland. What then can be imagined the consideration flowing from the father, the brothers, or any other person? If James had those lands on condition that he should give them to his brothers, where was his advantage? It was indeed impossible; but there is nothing to induce a belief that he took them on that secret condition. Can any man seriously consider the recital, respecting the father's inclination, as conclusive of an agreement with his father to take the lands on that condition. If such was really the father's inclination, if he meant that Basil and Bennett should have the lands in the event of James' succeeding Cochrane, how strange it is, that he did not secure the arrangement by a devise or conveyance. It is possible, that a man in his last sickness, and not having time to execute a proper will, might express an inclination to his eldest son—but if he did, the son would not be legally bound, and whatever conveyance of land, which had descended to him from his father, he might think proper to make to a brother or sister, would be considered as voluntary. This, at least, is the idea of the Chancellor.



It does not to the Chancellor seem clear from the books, what are the defects in a deed made on the best consideration, which this Court will supply merely on the idea of supplying the defect, but whatever they are, it is necessary, as has already been intimated, that there be a valid consideration in the defective deed.

There is a wide difference between a consideration which will suffice to give operation according to the intent of the grantor, to a deed duly executed, acknowledged and recorded, and a consideration which will entitle the grantee to the aid of this Court to supply \* the defect of a deed. Had the deed of James Browne been indented, acknowledged, and recorded according to law, **438** there is no doubt, except that which might arise from the circumstance of his being a British subject, that it would have operated according to his intent. But not having been either indented, acknowledged or recorded, it is the same thing as if it never had been made. It was, it is repeated, merely voluntary; he had no effective consideration for it; and he could not have been compelled to make it, if even the inclination of his father had been expressed under his hand and seal.

How numerous are the cases, and how deplorable many of them are, where a man makes a voluntary promise, breaks his word, and almost the heart of the party, and yet passes with legal impunity! It is not contended, that, in this respect, the law is right; but it is notorious that so the law is. Can then a reason be assigned why a man executing a voluntary defective conveyance shall be compelled to execute an effective deed, when if he had only made a voluntary promise to execute such a deed he would not be compelled? There can be no sensible, substantial distinction between the cases; and the covenant in the present case is merely a voluntary promise to convey. The consideration (if such it can be called,) of the defective conveyance, and the consideration for the covenant, being one and the same viz. the inclination of the father.

It has however been said, that there was a valid consideration, although not expressed; and that when a consideration exists, it is immaterial whether or not it be expressed. The Chancellor conceives, as matters stand, that it is unnecessary to examine whether or not the consideration of natural love and affection be such a consideration as will entitle the grantee to the aid of this Court to supply a defect. He conceives that the consideration of natural love and affection is out of the question, because it has not been expressed in the deed; and not being expressed, it is not to be supposed to have operated. The doctrine of \* the counsel appears novel and strange, when applied to a deed which plainly ex- **439** presses the consideration or motive for making it. It is wisely said by a late elegant writer on equity, "that a Court of equity, no more than a Court of law, shall supply a will (or intent) for the grantor. It will only do that which it is manifest the grantor would have done

had not the mistake been made." That is as much as to say, this Court shall not presume to assign an intent, or consideration, or motive, when the real intent, or consideration or motive, is plainly expressed. When no consideration whatever is expressed, there may be plausibility in asserting that the consideration of a deed from one brother to another was natural love and affection. It may be there said that the consideration is to be sought. But when that consideration was omitted, and yet the grantor thought it necessary or proper to express a consideration, with what propriety can any tribunal whatever say, or indeed, how can it believe, that natural love and affection was the motive? Suppose James to be the defendant, called on to execute a good deed—his very opposition to the bill would prove that natural love and affection were out of the question, or that, even if it operated at the time, he has since changed; and he ought to be as free now, as he was at the time of making the deed, nay, it is doubtful, under all the circumstances disclosed by the bill and answers, whether or not James Browne really intended that the deed should operate in favor of his brothers." Bill dismissed, but without costs. The complainants appealed to this Court.

*Shaaff*, for the appellants. The only question that can occur in this case is, whether the deed is made under such circumstances that the Court will aid its defects. There is no doubt but that Chancery has the general power to aid defects in conveyances when made on proper consideration. So many instances of this kind daily occur, that it would be waste of time to refer to authorities. Chancery will aid a mistake in a conveyance, as if the name of the lessor or lessee is omitted. So if, in a feoffment, livery is omitted, or if a bargain and sale is not enrolled. Many cases of this kind are collected in 2 *Com. Dig.* 170, 171, 172, 173. With respect to conveyances wholly voluntary, Courts of Chancery have generally left them to their legal operation, without affording any aid. The conveyance in this case may be considered in two points of view. 1. As being made on a good consideration, and 2. As being made on a valuable consideration.

On the first point he cited the case of *Pitsel vs. Pitsel*, decreed about five years ago in our Court of Chancery; also, 1 *Fonb. Eq.* 341; 1 *Vern.* 132; 2 *Com. Dig.* 122, 126; 3 *Bac. Ab.* 362; 5 *Ib.* 362, 363; 1 *Ib.* 275, 276; 1 *Co.* 176. On the second point he cited *Corcp.* 290; 1 *Vent.* 318; 1 *Esp.* 106; 1 *Vern.* 48; 2 *Com. Dig.* 122; *Cha. Rep.* 158.

*Winchester*, for the appellees.

\* The Court of Appeals, (RUMSEY, Ch. J., MACKALL, JONES, 446 POTTS, and DENNIS, JJ.) at this term, (June, 1803,) reversed the decree of the Court of Chancery and "adjudged, &c. that the Chancellor pass a decree thereby ordering and decreeing that the

appellee Charles Browne, for himself, and the infant defendants, Robert and Sarah Browne, by their guardian or guardians, to be appointed by the Chancellor for the purpose, shall by a good and sufficient deed or deeds of bargain and sale, to be duly executed, acknowledged and recorded, convey unto the complainant, Basil Browne, and his heirs, three undivided fourth parts of all the following tracts or parcels of land, to wit: A tract or parcel of land called Meagreholm, containing 608 acres of land, lying in Queen Anne's County; one other tract or parcel of land called Ashley, containing 95 acres and one-half acre, adjoining to the said first mentioned tract; and one other tract of land called Hobb's Venture, containing 281 acres, lying in Caroline County, which are the same lands intended to have been conveyed by the deed executed by James Browne to Bennett and Basil Browne, and dated on the 25th July, 1777, and exhibited in the bill in this cause filed.—And ordering and decreeing, that the said Charles Browne, for himself, and the infant defendants, Robert and Sarah Browne, by their guardian or guardians by the Chancellor for that purpose to be appointed, convey to the other complainant, Andrew Cochrane Browne, and his heirs, by a good and sufficient deed or deeds of bargain and sale, to be duly executed, acknowledged and recorded, the remaining undivided fourth part of the said three tracts of land above described. And it is adjudged, &c. that each party pay their own costs, as well in the Court of Chancery as in this Court."

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• GENERAL COURT, (E. S.) SEPT. TERM, 1803. 447

W. & M. SHARPE *vs.* GIBSON.

In an action of debt on a bond for the purchase money of land sold and conveyed, parol evidence cannot be given by a witness that he was seised of any part of the land so sold, in order to rebut the claim and title of the vendor to any part of the land included in his deed to the vendee, or to shew that the title to any part of the land so conveyed was not in the vendor at the time of the conveyance.

DEBT upon a writing obligatory, dated the 29th of August, 1797, conditioned for the payment of £9 current money per acre, for as many acres of land as plaintiffs should make the defendant, his heirs, &c. a good and legal title to in Island Creek Neck, agreeably to a bond of equal date with the said writing obligatory, passed by the plaintiffs to the defendant, &c. The defendant pleaded, 1st. General performance, and 2dly. That the plaintiffs had not made him a good and legal title, &c. *Replications*—To the first plea, non-performance—That the plaintiffs had a good and legal title before the issuing of the writ of and in 385 acres and 25 perches of certain

tracts of land, viz: Rattlesnake Point, Conjunction, Eason's Neck, Fancy, Eason's Lot, Inclosure and Sharp's Addition, all situate and being in the county aforesaid, and in the Island Creek Neck mentioned, &c. and so having a good and legal title, &c. they on the 18th of May, 1799, at, &c. signed, sealed, executed, acknowledged, and delivered to the defendant a good, legal, and valid deed of bargain and sale, for all and singular their interest, &c. in and to the said lands called, &c. agreeably to the bond of equal date, &c. That the said 385 acres and 25 perches, &c. at the rate of £9 current money per acre, amounted to 3,466*l.* 11*s.* 1*d.* current money, of which the defendant had notice, &c. yet, &c. To the 2d plea there was a similar replication, exhibiting the deed in *hæc verba*. *Rejoinders*—That the plaintiffs had not a good title, &c. Issues joined. Plots returned under warrant re-survey.

At the trial, the defendant offered Thomas Martin as a witness, to prove that he had, what he esteemed, a well grounded claim to 38 acres of the land which the plaintiffs have located as a part of the lands sold to the defendant, and to this end he proposed to prove by the said witness, that he was seized of the tract located on the plot 448 by the plaintiffs, called Rich Neck, \* and that he contended for the lines of the said tract as located, and that by a correct location of the tract called Rattle Snake Point, it did not interfere with Rich Neck; that he had cut trees on that part of Rattle Snake Point located within the lines of Rich Neck, in order to provoke an action of trespass to try his claim; that an action had been brought by the defendant for the said trespass, and that the same was now depending in this Court.

The plaintiff objected to this testimony as inadmissible.

DONE, J. (CHASE, Ch. J. absent. SPRIGG, J. concurred.) The Court are of opinion, that the evidence offered by the defendant is not competent and legal evidence to go to the jury to rebut the claim and title of the plaintiffs to any part of the lands to which they claim title, and which are included in their deed to the defendant; or to shew that the title to any part of the lands so conveyed was not in the plaintiffs at the time of making the conveyance to the defendant. The defendant excepted.

Verdicts and judgment for the plaintiff. The defendant appealed to the Court of Appeals.

*J. Bayly*, for the appellant.

*Harper* and *Scott*, for the appellees.

The Court of Appeals at June Term, 1805, affirmed the judgment of the General Court.

## GENERAL COURT, (E. S.) SEPT. TERM, 1803.

## REID vs. WETHERED, and vs. GLEAVES.

In an action of debt on a replevin bond, where general performance was pleaded, the replication stated that a writ of replevin had been prosecuted, &c. and that a judgment was rendered *de retorno habendo*, &c. After a judgment by default against the defendant, there being no rejoinder to the replication, there was a writ of inquiry to assess damages, when the plaintiff offered to read from the record *oyer* of the replevin bond upon which the suit was brought, to which the defendant objected. *Held*, that the original bond need not be produced, but that it might be read from the record, because

1st. The original replevin bond is an office paper in the County Court, taken and filed by the clerk who issued the writ.

2nd. The plea of general performance to a bond with a collateral condition is like that of payment to a bond for money; and on a writ of inquiry need not be produced when there is *oyer* of it in a record.

THESE were actions of debt upon a replevin bond. General performances were pleaded. Replications stating a writ of replevin prosecuted out of Kent County \* Court; that a judgment was rendered *de retorno habendo*, and for one penny damages, and **449** costs, as by the record thereof from the County Court produced. Rules rejoinder, and judgments by default. An inquiry at bar being demanded a jury was charged in both cases at once.

The plaintiff's attorney offered to read from the record so produced from Kent County Court, *oyer* of the replevin bond upon which these suits were brought. To which the defendant's attorney objected.

But it was received by the Court. *First*.—Because the original replevin bond is an office paper in the County Court, taken and filed by the clerk who issued the writ of replevin. *Secondly*.—Because the plea of general performance to a bond with a collateral condition, is like that of payment to a bond for money; and on a writ of inquiry need not be produced where there is *oyer* of it in a record.

## GENERAL COURT, (E. S.) SEPT. TERM, 1803.

## WILLIAMSON, use of WALLIS vs. PERKINS.

Land taken under a *feri facias* must be specially described; otherwise the seizure is void, and the execution will, on motion, be quashed. (a)

(a) Affirmed in *Clark vs. Belmear*, 1 G. & J. 448, and in *Dorsey vs. Dorsey*, 28 Md. 393. As to sales under a *fi. fa.* and the requisites of the schedule and return, see *Estep vs. Weems*, 6 G. & J. 303; *Duvall vs. Waters*, 1 Bl. 591; *Waters vs. Duvall*, 6 G. & J. 76; S. C. 11 G. & J. 37; *Jarboe vs. Hall*, 37 Md. 345; *Busey vs. Tuck*, 47 Md. 171. In *Miller vs. Wilson*, 32 Md. 800, it is said

Where the schedule returned with a *fiery facias* described the property seized under the writ as follows: "dwelling house, grist-mill, saw-mill, and fulling-mill, and all other buildings belonging thereunto, with one hundred acres of land joining the said property," it was held that the description was insufficient and the return was quashed,

Where a writ of *venditioni exponas* was countermanded by the plaintiff, and on the writ was an endorsement by the plaintiff, acknowledging the receipt from A. of the balance due upon the judgment, and assigning his interest in the same to A., and the writ was renewed at a subsequent term, endorsed to the use of A., it was held that the endorsement by way of assignment was an acknowledgment of satisfaction by the plaintiff from the defendant through A., and the renewed writ and the return were quashed. (a)

MOTION, and rule on the plaintiff to show cause why the writ of *venditioni exponas*, issued in this case, should not be set aside.

It appeared that a *fiery facias* issued, returnable to September Term, 1800, and was returned by the sheriff "laid as per schedule, and on hand for want of buyers." The schedule referred to is as follows: "A schedule of the property of Ebenezer Perkins, taken with a *fi. fa.* at the suit of David Williamson, and appraised by us, the subscribers, we being first qualified, this 30th day of August, 1800.

"To dwelling house, grist-mill, saw-mill and fulling-mill, and all other buildings belonging thereunto, with one hundred acres of land joining the said property." The schedule was not signed by any persons as appraisers, or by the sheriff. A writ of *venditioni exponas* \* then issued, returnable to September Term, 1801, and was returned by the sheriff, "countermanded by plaintiff." On the back of the last mentioned writ was the following assignment: "Chester-Town, 1st Sept. 1801. For and in consideration of the sum of twelve hundred and seventy-three dollars, and ninety-three cents, being the balance due me upon the within *venditioni exponas*, and paid me by Mr. Samuel Wallis, I hereby transfer and make over all my right, claim and interest, to the within judgment, to the said Samuel Wallis, and his assigns. Witness my hand.

Test: EBENEZER PERKINS. D. WILLIAMSON."

The last mentioned writ was renewed to this term, (September, 1803,) and endorsed for the use of Samuel Wallis, and the sheriff returned the same endorsed, "I do hereby certify, that on the 8th day of August, 1803, I did sell at public sale all the within mentioned

that an appraisement of the property seized under an execution is not necessary, and that in the case in the text it was conceded by counsel on both sides not to be necessary. The case in the text is distinguished in *Waters vs. Peach*, 3 G. & J. 412.

(a) Recognized in *Parker vs. Sedwick*, 5 Md. 287, where it was held that any endorsement upon a writ of *fiery facias*, when returned, relating to the satisfaction of the judgment, is presumed *prima facie* to be there with the knowledge of the sheriff and to be true.

property, agreeably to the within writ, to Samuel Wallis of Chester-Town, for the sum of \$500, he being the highest bidder.

So answers B. Hatchison, late sheriff of Kent County."

The defendant's attorneys filed the following reasons for setting aside the *venditioni exponas*.

1st. Because the return upon the *fi. fa.* is erroneous, inasmuch as there appears a schedule, importing to be a schedule of property taken upon appraisement, whereas there is no appraisement.

2d. Because the same schedule is not signed by the sheriff, but by a sub-sheriff.

3d. Because upon a *venditioni exponas* which issued upon the *fi. fa.* the same was countermanded by the plaintiff.

4th. Because the first *venditioni exponas* was issued returnable to September, 1801, whereas the same ought to have been returnable to April, 1801.

5th. Because the second *venditioni exponas* was issued to this present term.

\* *Spencer and James Scott*, for the defendant, urged that the *feri facias* was defective in its return, because there had 451 been no appraisement of the property seised under it. That the sheriff, after he has laid a *fi. fa.* and the sale is countermanded by the plaintiff, cannot afterwards retain possession of the goods. That it was like the discharge by a plaintiff of a defendant, taken on a *ca. sa.* and the same reasoning applied to prevent a second *venditioni exponas* from being issued, where the first has been countermanded by the plaintiff, and the defendant was discharged by the seizure of his goods *ad valorem debite*, and the sheriff was discharged by the countermand of the *venditioni exponas*, and no sale could be afterwards made under it.

*Hammond* against the motion, contended, that the countermand released nothing but the immediate sale, and was not like a discharge of a defendant taken on a *ca. sa.* That no appraisement of the property was necessary on a *fi. fa.* The idea is derived from executions in England by extent and *elegit*, and the lumber Act in this State. He was prepared to prove there was no fraud in laying the *fi. fa.* or selling under the *venditioni exponas*. The property was very much incumbered, and to set aside this *venditioni exponas* would be to take away that very property, the seizure of which, counsel have contended, discharged the defendant from the debt, and assimilated it to a judgment discharged by a sheriff's return of, made on a *fi. fa.*

*Spencer and Scott*, in reply, admitted that an appraisement of the property was not necessary, but they contended that the return on the *fi. fa.* was erroneous, because the land taken was not described by metes and bounds, or identified in any other way. That if an ejectment was brought for the land thus described, no location

thereof could be made, nor could possession be delivered. The part seised and sold is wholly uncertain.

**452** \* THE COURT. The return on the *fiery facias* is defective for want of a specification of the property; and the endorsement, by way of assignment, of the judgment from Williamson to Wallis, is an acknowledgment of satisfaction by the plaintiff from the defendant, through Wallis, in express terms, and appears as part of the return itself; and this idea is confirmed by the sheriff's return on the *venditioni exponas*, "countermanded by plaintiff."

*Venditioni exponas and return quashed.*

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GENERAL COURT, OCTOBER TERM, 1803.

RIDGELY vs. CAMPBELL.

Notwithstanding notice of trial, a continuance of the action will be granted to the defendant on suggestion of the existence of a bill in Chancery by him against the plaintiff, for a discovery of facts material in the trial of the action, and that due diligence had been used to obtain the plaintiff's answer.

THIS was an action of *assumpsit*, brought to May Term, 1802, and continued from the last term under notice of trial, and being now called, the plaintiff's counsel insisting upon a trial,

*Key and Shaaff*, for the defendant, moved for a continuance. They stated, that a bill had been filed in Chancery by the defendant against the plaintiff, for a discovery of certain facts material in the trial of this case. That due diligence had been used by the defendant to obtain the plaintiff's answer to that bill, but that it had not been obtained. They cited the case of *McMechen vs. M'Laughlin's Executor*, 4 Harr. & McHen. 166, where this Court, upon a similar motion and suggestion, continued the cause.

*Martin*, (Attorney-General,) *Ridgely* and *Moale*, for the plaintiff.

THE COURT. Let the cause be continued.

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**453** \* GENERAL COURT, OCTOBER TERM, 1803.

WEST vs. HUGHES.

An attachment may be had against a sheriff for not returning a writ.

THIS was a writ of *venditioni exponas* directed to the sheriff of Harford County, and returnable to this term. But no return being



made, *Mason*, for the plaintiff, moved the Court for an attachment against the sheriff, and cited 5 *Burr*. 2686, 2502, 651.

THE COURT. Let the attachment issue.

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GENERAL COURT, OCTOBER TERM, 1803.

HARPER vs. HAMPTON.

Where there are issues in fact and in law, the last shall be tried first. (a)

Where to a plea of limitations the plaintiff replies "*beyond seas*," to wit, in another State, a rejoinder of the Act of Limitations of such other State is a departure from the plea, and fatal on demurrer.

THIS was an action of *assumpsit*. The declaration contained nine counts. 1st count, on a special agreement, viz. That before and at the time of the agreement, to wit, on the 25th of August, 1794, at Columbia, in the State of South Carolina, to wit, at Baltimore County, a certain Jacob Rumph was seized in fee simple and possessed of 150,000 acres of land, situate in the fork of Edisto, in the said State of S. C. and being so seized and possessed did, for certain good and valuable considerations him thereunto moving, and by a certain letter of attorney duly executed under his hand and seal, authorize and empower the plaintiff, as attorney for him the said Rumph, and in his name, to sell and dispose of the said lands, and by a good deed of conveyance to convey the same to such person, and for such sum of money, or other payment, as he the plaintiff should think fit, and the money, or other payment, to arise and grow due from the said sale and land, to take and receive to and for his the plaintiff's own proper use and behoof, of which the defendant had notice. And that afterwards, on the same day, &c. at Columbia, in the State of S. C. aforesaid, to wit, at Baltimore County aforesaid, the said Rumph being so \* seized, &c. and the said plaintiff being by him the said Rumph, so authorized, &c. a **454** conversation was had and moved between the plaintiff and defendant of and concerning the sale and purchase of the said land; and it was then and there agreed by and between the plaintiff and defendant, that the plaintiff should forthwith sign, seal, and duly execute, to a certain John Hall of the City of Philadelphia, a good and sufficient deed of conveyance, in the name of the said Rumph, and by virtue of the power and authority aforesaid, of and for the said land, &c. and should then and there deliver the said deed to the defendant as an *escrow*, to be by him the defendant delivered to the said Hall, in case he the said Hall should purchase the said land from the plaintiff, by and through the agency of the defendant, and

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(a) See *Harper vs. Hampton*, post, m. p. 622.

should well and truly pay, or secure to be paid, the purchase money therefor to the defendant, to and for the use of the plaintiff, and not otherwise. And further, that the defendant forthwith, after receiving the said deed, should use his endeavors to sell the said land for the plaintiff to the said Hall, through his means and agency, for a good and suitable price; and in case of making such sale, should receive and take the purchase money of the said land, or other payment therefor, for the use of the plaintiff, and should thereupon deliver the said deed to the said Hall, and should forthwith pay and deliver the said purchase money, or other payment of and for the said land, to the plaintiff, and well and truly account with and to him therefor, whenever after he the defendant should by the plaintiff be thereunto required. And further, that the plaintiff should allow and pay to the defendant, to be deducted and retained out of the purchase money aforesaid, all such reasonable and necessary expenses as by him the defendant should be incurred, paid or laid out, in and about the premises; and should also give to him the defendant a sufficient indemnity and counter security for all such warrantees or guaranteees, as he the defendant should necessarily and properly enter into in and about the premises. In consideration of the performance of

**455** all \* which stipulations, &c. by the plaintiff, by him agreed as aforesaid, to be done and performed on his part, the defendant then and there, to wit, &c. undertook, and to the plaintiff faithfully promised to do and perform all, &c. by him the defendant on his part stipulated and agreed as aforesaid, to be done and performed, And the plaintiff averred, that he did then and there, to wit, &c. sign, seal and execute, in the name and as the attorney of the said Rumph, and by virtue of the letter of attorney and power aforesaid, a good deed of conveyance of and for the said land, to the said Hall, in fee simple, sufficient in law to convey the same land to him the said Hall, and his heirs and assigns, and the said deed did then and there deliver to the defendant, as an *escrow*, to be delivered to the said Hall, in the manner, and on the terms and conditions, and for the purposes aforesaid; and that the defendant afterwards, to wit, on the 1st of October, in the year aforesaid, at Philadelphia, in the State of Pennsylvania, to wit, at Baltimore County aforesaid, in pursuance and by virtue of the agreement aforesaid, did sell the said lands to the said Hall in fee simple, for a certain large price, to wit, for the price of one shilling current money of Pennsylvania, equal to the like sum of current money of Maryland, for each and every acre of the said 150,000 acres of land in the said deed contained and conveyed, and did then and there receive the said purchase money of and from the said Hall, or of and from some other person for him or on his account, and by his orders, which said purchase money amounted in the whole to the sum of £7,500 current money of Pennsylvania, which sum then was, and always since hath been, and still is, equal to and of the value of the

like sum of current money of Maryland. That the plaintiff was always since the said 1st of October, and still is, ready and willing to allow and pay the defendant, and to permit him to deduct and retain, &c. all such reasonable and necessary expenses, &c. if any, &c. and also to give to the defendant a sufficient indemnity and counter security, &c. if any, &c.

\* 2d Count.—Upon the same agreement, (omitting the setting out the title of the land in Rumph, and his letter of attorney, &c.) **456**

3d Count.—Upon the same agreement, stating that the defendant sold the land for, and received Morris and Nicholson's notes in payment, &c.

4th Count.—Upon the same agreement, and that said notes were received in payment, &c.

5th Count.—*Indebitatus assumpsit* for 150,000 acres of land, &c. sold and conveyed.

6th Count.—*Quantum valebat* for 150,000 acres of land sold and conveyed.

7th Count.—*Indebitatus assumpsit* for 150,000 acres of land sold and conveyed to John Hall, &c. for the use of and in trust for the defendant.

8th Count.—*Quantum valebat* for 150,000 acres of land sold and conveyed to John Hall, for the use of and in trust for the defendant.

9th Count.—General *indebitatus assumpsit* for money had and received, &c.

The defendant put in nineteen pleas to the declaration, viz:

1st. *Non-assumpsit*, on which issue was joined.

2d. *Non-assumpsit infra tres annos*, (Act of Limitations of Maryland,) to the 1st count in the declaration.

The replication to the last plea was, that at the time when, &c. both the plaintiff and defendant did reside and were beyond the seas, and absent out of the State of Maryland, to wit, at Philadelphia in the State of Pennsylvania, one of the United States of America; and that the plaintiff continued to reside, and did remain beyond the seas, from the aforesaid time, until afterwards, to wit, on the 1st of July, 1799, he returned and came into this State, to wit, at Baltimore County aforesaid; and that the defendant did also remain and reside beyond seas, without the limits of this State, and absent therefrom, to wit, at Philadelphia, from the time when he the defendant did assume, &c. until he afterwards, to wit, on the 1st of June, 1802, returned and came into this State, to wit, at Baltimore County aforesaid, &c.

\* Rejoinder.—That by a statute of the said State of Pennsylvania, enacted and passed on the 27th of March, 1713, which **457** at the time when the said pretended cause of action is alleged to have accrued, was, ever since hath been, and still is, in force in the said

State of Pennsylvania, that is to say, at Baltimore County aforesaid, entitled "An Act for Limitations of actions," it was among other things enacted in and by the said statute, "that," &c. (viz. that actions on the case should be brought within six years after the cause of action accrued,) *non-assumpsit infra sex annos*, &c. Demurrer and joinder thereto.

3d. *Actio non accrevit infra tres annos*, (Act of Limitation of Maryland,) to the 1st count. Replication and rejoinder, similar to those to the 2d plea. Demurrer and joinder.

The rest of the pleadings are omitted, because the question decided by the Court turned solely on the demurrers which are stated, and demurrers to similar pleadings to the other counts in the declaration.

*Mason*, for the defendant, inquired of the Court whether the issues in fact, or the issues in law, were to be first tried. He cited 4 *Bac. Ab. tit. Pleas and Pleading*, (No. 1;) *Co. Litt.* 72 a, 125.

*Martin*, (Attorney-General,) for the plaintiff. The general rule is to try the issues in law first. Great inconvenience might result from the issues in fact being first tried; for if verdicts were found for the plaintiff on the issues in fact, and the Court should decide in favor of the defendant on the issues in law, how could the verdicts be got clear of. He cited *Robinson vs. Rayley*, 1 *Burr.* 317.

The Court, *DONE* and *SPRIGG*, JJ. (*CHASE*, Ch. J. absent,) determined that the issues in law should be tried first.

*Harper* and *Martin*, (Attorney-General,) on the demurrers, contended—1. That the rejoinders are departures from the defendant's pleas; \* And 2. That if they are not departures, they are insufficient to prevent the plaintiff's recovery. First as to the departure. The rejoinder should support the plea; if it were otherwise, controversy would be endless. 4 *Bac. Abr.* 122, *tit. Pleas and Pleading*.

Secondly.—The rejoinders are insufficient, admitting them not to be departures. The Act of Limitations of another State can never be pleaded so as to be a bar in this State. By the Act of 1715, ch. 23, suits must be brought within a particular time, and not after. It is a prohibitory Act to the Courts of the State. The debt is not destroyed, but the remedy is taken away. The limitation goes to the remedy, not to the right. *Swayne et al. vs. Wallinger*, 2 *Str.* 746; *Quantock et al. vs. England*, 5 *Burr.* 2628; *Melan vs. Duke of Fitzjames*, 1 *Boss. and Pull.* 138; 3 *Bac. Abr.* 512, *tit. Limitation of Actions*; 6 *Mod.* 25.

*Mason*, for the defendant.

\* *DONE*, J. (*SPRIGG*, J. concurred.) A distinction has been taken between the right and the remedy. They are co-exten-

sive, and if the remedy is barred it operates every where. The cases cited bear very slightly upon the case at bar. The defendant might have pleaded specially the Act of Limitations of Pennsylvania.

The suit is upon a cause of action said to have accrued in Maryland. The cause of action attached to the person, and follows the person. The Act of Limitation of Maryland has been pleaded by the defendant. The plaintiff to avoid it replied the savings of the Act. This is correct pleading, and is not a departure from the declaration. The defendant introduces in his rejoinder the Act of Limitations of Pennsylvania, which is an abandonment of his first defence, and of course is a fatal departure.

The Court are therefore of opinion, upon each of the demurrers, that the rejoinder of the defendant is not in law a sufficient answer to the replication of the plaintiff in this cause, but that the matter alleged in the rejoinder is a departure from the plea of the defendant; and therefore the Court give judgment for the plaintiff on the demurrers in this cause.

A juror was withdrawn by consent, and the cause continued.

## GENERAL COURT, OCTOBER TERM, 1803.

### MIDDLETON vs. EDELEN.

Where a rule of Court authorizes, under circumstances, a continuance of a cause on the suggestion of either party, without costs, those circumstances must be proved, otherwise than by such party's oath.

*TRESPASS quare clausum fregit.* The lands in dispute were located, and plots, with depositions taken on the survey, were returned. Some of the witnesses, whose depositions had been so taken, were sick and unable to attend Court.

\* *Buchanan*, for the plaintiff, moved for a continuance of the cause without costs, under the rule of the Court made at May Term, 1790, viz. "That when any cause shall be continued under affidavit of the inability of a witness to attend, whose deposition has been taken in the presence of the adverse party, and filed in Court, if either party will not permit such deposition to be read, nor agree to the taking of the deposition of such absent witness on interrogatories, to be exhibited in writing, the party so refusing shall not be entitled to his costs of the term, as of course, under any rule of this Court," unless the defendant would consent that the depositions of the witnesses, who were unable to attend from indisposition, might be read at the trial. He filed in Court an affidavit of the plaintiff, stating, among other things, that the agent of the defendant was present when those depositions were taken on the survey. 462

*Key*, for the defendant, objected to the proof offered by the plaintiff as insufficient to exonerate him from the payment of costs, under the above rule of Court. Indifferent testimony, he said, was necessary and not that of the plaintiff himself.

CHASE, Ch. J. The Court are of opinion, that the fact, that the agent of the defendant was present when the depositions were taken on the survey, cannot be proved by the oath of the plaintiff himself. He must establish that fact by indifferent testimony, or the cause must be continued at his expense.

*Mason*, *Shaff* and *Buchanan*, for the plaintiff.

*Martin*, (Attorney-General,) *Key* and *Kilty*, for the defendant.

#### 463 \* GENERAL COURT, OCTOBER TERM, 1803.

##### CRETZER'S Lessee *vs.* THOMAS.

Where the plaintiff brings an action of ejectment for an entire tract of land, and shows title to an undivided moiety of a part only, he may recover such moiety. (a)

EJECTMENT for a tract of land called The Resurvey on Hills, Dales and the Vineyard, lying in Washington County. Defence on warrant, and plots were returned. The plaintiff located on the plots, as his claim and pretensions, a deed to his lessor from James Chapline, for an undivided moiety of a part of the tract of land for which the ejectment was brought; and at the trial he shewed title to such undivided moiety only, which was objected to on the ground that the ejectment was brought for the whole tract.

DONE, J. This question has been settled. Verdict and judgment for the plaintiff for an undivided moiety of that part of the tract of land named in the declaration, which is included in the deed from Chapline to Cretzer, and located on the plots returned in the cause, beginning, &c.

*Mason*, for the plaintiff.

*Shaff*, for the defendant.

(a) In *Carroll vs. Norwood*, 5 H. & J. 155, it was held that a plaintiff in ejectment may recover less than he claims; but it must be of the same nature. If he declares for an undivided part, he may recover any smaller undivided part, or if he declares for an entirety, any smaller entirety, but he cannot recover an entirety if he declares for an undivided interest, nor an undivided interest if he declares for an entirety. But see Code, Art. 75, s. 23, as to amendments.

## COURT OF APPEALS, NOV. TERM, 1803.

## DORSEY'S Ex'rs vs. WHETCROFT'S Adm'r.

Where on plea of *nul tiel record* to an action of debt on a judgment, the Court decide by an inspection of the record, the record inspected makes no part of the proceedings, and does not go up to the Appellate Court, where there is an appeal. (a)

APPEAL from the General Court. The appellee brought an action of debt against the appellant, upon a judgment, recovered by intestate against the appellant's testator, in the General Court. Plea *nul tiel record* and replication, *habetur tale recordum*. The General Court, upon inspection of the record, gave judgment for the appellee; from which judgment this appeal was made. The case standing under rule argument.

\* *Ridgely*, for the appellants, moved for a writ of diminution to the General Court. He stated, that by the record 464 transmitted from the General Court to this Court, the record which the General Court had inspected did not make a part of the record now before this Court, so that this Court could not determine whether the General Court had given a proper judgment or not. That to enable this Court to form a correct judgment in the case, the inspected record should appear.

*Key*, for the appellee. Upon the plea of *nul tiel record*, the Court, like the jury in other cases of fact, determine by an inspection of the record. If the party wished for the benefit of a revision of the Court's opinion, the counsel ought, by the pleadings, to have spread the former record upon the present one, so that it might constitute a part of it. There is no case where upon the plea of *nul tiel record* the inspected record is made a part of the proceedings. Suppose the Court had said there was no such record, and if there had been none, how could it make a part of the proceedings? The party is bound by the decision in the same manner as if the jury had given a verdict.

BUMSEY, Ch. J. The Court are of opinion, that they cannot grant the writ of diminution. It does not appear to them 465 that the record is diminished. None of the forms in the books introduce the inspected record; and if the writ were granted, the Court cannot see how the record could be transmitted different from what it now is.

(a) Approved in *McKnew vs. Duvall*, 45 Md. 506. The decision of the lower Court on a plea of *nul tiel record*, can be reviewed only by means of a bill of exception setting forth the record offered. *Duvall vs. Wells*, 4 H. & McH. 114, note.

Suppose the action had been upon a judgment rendered in another Court. The record of the judgment is offered in evidence, but not made a part of the proceedings, unless particularly excepted to, and introduced in a bill of exceptions.

*Martin*, (Attorney-General,) *Ridgely*, *Mason*, and *W. Dorsey*, for the appellants.

*Key* and *Shaff*, for the appellee.

The appellant's counsel dismissed the appeal.

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### COURT OF APPEALS, NOV. TERM, 1803.

#### TODD *et ux.* vs. PRATT.

Equity will not enjoin the execution of a judgment in ejectment rendered for a mortgagee against a mortgagor, upon the ground that a part of the mortgage debt was paid, &c. until the plaintiff in the ejectment has been summoned and heard. (a)

A tenant in tail may mortgage the entailed lands and thereby dock the entail.

APPEAL from a decree of the Court of Chancery. The bill stated, that Rachael Baynard, the complainant in the Court of Chancery, who afterwards married William Todd, (the now appellants,) in September, 1796, by her bill set forth, that George Baynard, deceased, on the 24th of October, 1787, mortgaged to Pratt, the defendant, part of a tract of land called Relief, containing 576 acres, Baynard's Pasture containing 101 acres, part of Roe's Chance containing 97 acres, and sundry negroes, in consideration of £738 current money. That George Baynard, on the 1st of June, 1793, made a second mortgage to Pratt of the said lands and premises, and negroes, in consideration of 1,016*l.* 11*s.* 4*d.* current money. That both the said sums were not due; that there had been dealings between Baynard and Pratt, and that Baynard was indebted to Pratt, but not to the amount expressed in the said mortgages. That payments had been made, and no credit given; and twenty-five per cent. interest had been charged, &c. That Baynard died before the expiration  
**466** \* of the day of payment in the last mortgage, intestate, and without issue, leaving the said Rachel, his sister, and heir at law. That Pratt had brought an ejectment, and recovered judgment for the lands in the said mortgages, also replevin for the negroes, which is depending in the Eastern Shore General Court. Prayer, that Pratt be compelled to account, &c. and upon payment of the sum due, be compelled to reconvey the lands, &c. to the said Rachel, and that injunction issue, &c.

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(a) So held in *Jones vs. Magill*, 1 Bland, 180.



HANSON, C. (September 16th, 1796,) passed the following order: The bill states a mortgage or mortgages of land and negroes, duly executed, to secure to the defendant the payment of certain sums of money, and that the defendant has instituted an action of replevin for the negroes, and obtained judgment in an ejectment brought for the land. It prays an injunction to prevent him from further proceedings at law, on the ground that the money, or great part of it, for which the mortgage was given, is not due to the mortgagee. Supposing the Act of George II, to have been introduced, used, and practised under in this State, the complainant, with respect to the land, had her remedy at law, she might have brought into the General Court the money due, an account of which would have been taken under the authority of that Court. Supposing that statute not to have been extended to this State, where is the case which will authorize this Court to enjoin the mortgagee before hearing from taking an execution on his judgment at law? The very preamble of the said statute recites, that Courts of equity grant no relief before hearing; and although this Court may have gone further than the Courts of equity in England, and further than is proper in granting injunctions before hearing, there has been no case in which it has gone so far as it is prayed to go in the present case. Independently of this consideration, the Chancellor conceives it unreasonable, under the circumstances stated in the bill, to interfere with the \* proceedings at law. Why did the complainant delay her applica- 467  
tion to this Court, when a bill filed here in due time for redemption, if she has accurately stated every fact relative to her case, might have effectually prevented any inconvenience of which she complains? Upon the whole, the Chancellor is of opinion that he cannot, with propriety, grant the injunction prayed, or any other relief, before the defendant shall have been summoned and heard.

The defendant afterwards answered, that he had taken the mortgages, and had recovered judgment for the land, and had replevied the negroes, but only with a view to compel payment of the money due him. And he stated how the sums of money in the mortgages became due to him, and exhibited his accounts, &c.

Upon the marriage of the said Rachel with William Todd, the suit abated, and a bill of revivor was filed by Todd and wife against Pratt, who appeared, &c. Upon a general replication being entered to the answer, the auditor was directed to state the accounts, &c. who did state two accounts, one of which stated that 1,591*l.* 5*s.* 1*d.* current money, including interest, was due on the 20th May, 1801, on the mortgages; and the other, that 1,627*l.* 5*s.* 3*d.* current money, including a balance due on an open account, was due on the same day, including interest, &c. deducting the amount of the sales of the negroes made in virtue of an interlocutory decree of the Court of Chancery.

*Key*, for the complainants, objected to a decree confirming the report of the auditor, so far as the same should affect the tract of land called Relief. 1. Because that tract was originally the estate of Thomas Baynard, who was seised thereof in fee, and by his last will and testament entailed it on his son George, from whom it descended to his son George, the mortgagor, in tail. 2. That the said entail had never been barred or docked either by George, the devisee, or George, the mortgagor; and that the mortgage did not bar or dock the entail. \* 3. That the complainant, **468** Rachel, is heir in tail of the said tract of land. 4. That the knowledge of this entail did not come to either of the complainants until since their intermarriage and the reference of the accounts to the auditor.

HANSON, C. (October, 1801,) passed the following decree: "The Chancellor has considered the complainants' exceptions; and the same are disallowed. There can, he conceives, be no doubt, that if tenant in tail can give an absolute conveyance in fee under the Act of Assembly, as tenant in fee, he may also give a conveyance in fee, subject to be avoided on the future payment of money by the said tenant; or, in other words, that tenant in tail may mortgage his land. Could the Chancellor conceive the point at all doubtful, he would require the opinion of the General Court.

"It is the auditor's account, No. 2, which the Chancellor hereby ratifies, and he conceives the complainants are not entitled to redeem, without paying the balance therein stated, of 1,627*l.* 5*s.* 3*d.* with interest from the 20th of May last, when the account was stated." And in conformity with the agreement of the parties, and the decision of the Chancellor, he decreed accordingly. From which decree the complainants appealed to this Court.

*Key* and *Johnson*, for the appellants.

*Martin*, (Attorney-General,) for the appellee.

The Court of Appeals, at this term, affirmed the decree of the Court of Chancery.

#### **469** \* COURT OF CHANCERY, DEC. TERM, 1803.

TYSON *et al.* *vs.* HOLLINGSWORTH *et al.*

Where there is a deficiency of assets in the hands of an executor or administrator, the Court of Chancery will decree a sale of the real estate devolving on the heir, &c. of full age. (a)

(a) By Rev. Code, Art. 66, s. 1, provision is made for the sale of a decedent's real estate to pay his debts when the personal estate is insufficient. By Rev. Code, Art. 64, s. 9, devisees may be sued by creditors without making the heirs at law of the testator parties, unless they are known to

THIS was a bill filed by the creditors of Parkin and McKenna against Parkin's heir, devisee and administrator, and McKenna's executor. The bill stated, amongst other things, that Parkin and McKenna, having been partners in trade, were both dead, and that their partnership effects and personal estate were insufficient to pay off and discharge their debts, and that the whole of the said partnership effects, and their personal estate, had been exhausted in the payment of their debts, and there remained due and owing from their estate to the complainants, a considerable sum of money. That Parkin, at the time of his death, was seised and possessed in fee simple of a valuable real estate. That McKenna was not seised or possessed at the time of his death of any real estate. That Parkin devised his real estate to his mother Rachel Hollingsworth, the wife of Jesse, one of the defendants, in fee. That the complainants have no means of obtaining payment of their debts without resorting to a sale of the said real estate of Parkin, which they are advised is liable for the payment of said debts. Prayer, that the said real estate, or so much, &c. may be decreed to be sold to pay the debts due to the complainants, &c.

On the coming in of the answers, &c.

HANSON, C. (23d December, 1803,) decreed as follows: Whether or not, in case of a deficiency of assets in the hands of the executor or administrator, this Court can decree a sale of a real estate devolving on a person of full age, hath heretofore been considered as doubtful. In fact, there has been no such decree in this Court. And in one case where creditors, several years since, filed a bill against the heir of full age, who by his answer expressed his willingness to have the land sold for paying all the creditors, the Chancellor refused to execute the power. He hath since often \* reflected on the subject, and thought that in that case he might have done **470** wrong. For inasmuch as an executor or administrator is suable in this Court, on the ground of discovery, and land is in this State liable for all debts, as well as the personal estate, there seems no reason wherefore an heir should not be sued on the same ground. Indeed this very case shews the propriety of this Court exercising the jurisdiction. Here is a dispute between the executor of one partner, and the administrator of the other partner, and an heir and devisee, as well as between them all and the creditors; and if the creditors were referred to a remedy at law, it would be almost, if not altogether impracticable, to obtain it. But here, if the Chancellor be right in his present opinion, the remedy is easily attainable; all parties being compellable to account, in order to shew what is the amount of real and personal assets, as well as to shew what are the just claims

the plaintiff, and reside in the State. Under Rev. Code, Art. 67, s. 26, an attachment may be laid upon the land of a non-resident heir or devisee for a debt of the decedent. See *Hammond vs. Gaither*, 3 H. & McH. 143, note.

against the deceased; and the interference of this Court being obviously to the advantage of all parties, decreed, that the defendant, James Carey, shall account for the personal assets in his hand, as executor of Francis McKenna, surviving partner of Parkin & McKenna, both in the right of the said McKenna alone, and of McKenna as surviving partner aforesaid. That the said Susanna Goodwin, as administratrix with the will annexed of Thomas Parkin, shall account for the personal assets in her hands. That the auditor of this Court shall state the said accounts, &c. He shall state the several claims of the complainants, &c. And inasmuch, as it appears to the Chancellor that the claims of the complainants, although not yet precisely ascertained, will require a sale of the real estate in the bill mentioned, it is further decreed, that all that tract of land, &c. be sold, &c.

#### 471 \* GENERAL COURT, (E. S.) APRIL TERM, 1804.

##### ARNOTT and COPPER *vs.* NICHOLLS.

If after a judgment has been rendered against a defendant, he sells and conveys his lands *bona fide*, and for a valuable consideration, a writ of *feri facias* cannot afterwards be laid thereon, although twelve months and a day had not expired, unless a *scire facias* had been sued out upon the judgment, and notice given to the vendee, as terre-tenant. (a)

On a motion to quash the return to such a *feri facias*, as much and more may be inquired into as in an action of ejectment, the Court having an equitable control.

HINDMAN *vs.* RINGGOLD, note:

Under the Statute of 5 Geo. II, ch. 7, lands are made liable to the payment of debts, in like manner as personal estate. By the Statute of 29 Car. II, ch. 3, s. 16, a *feri facias* against personal estate, first delivered to the sheriff, will have the preference; and as that statute makes no difference, except as to purchasers, a *feri facias* against lands, &c. remains as a

(a) Overruled by *McElderry vs. Smith*, 2 H. & J. 72, where it was held that if a defendant, pending a *sci. fa.* on a judgment against him, alien his lands, the plaintiff may, after a *fiat* on the *sci. fa.* issue an execution and levy it on the land so aliened, without proceeding against the alienee. When a debtor aliens lands subject to the lien of a judgment, before the right to issue an immediate execution is suspended, a *feri facias* may be levied on such lands without a precedent *scire facias* to affect the terre-tenant. *Murphy vs. Cord*, 12 G. & J. 182; *Doub vs. Barnes*, 4 Gill, 2; *Warfield vs. Brewer*, Ibid, 265. In the last named case, the Court expressly says, that the case in the text has been overruled. When a sole defendant dies after judgment, it may be revived and an execution had against his land by suing out a *scire facias* against the heirs and terre-tenants, without proceeding against the personal representatives. *Polk vs. Pendleton*, 31 Md. 118. As to the requisites of a *sci. fa.* against terre-tenants, see *Thomas vs. Bank*, 46 Md. 43. See 2 *Poe's Pldg.* sec. 593.

*feri facias* against personal estate at common law, and that which is first delivered will have the preference, and shall be first satisfied. (a)

MOTION to quash the return made upon a writ of *feri facias*. At September Term, 1802, the plaintiffs obtained a judgment in this Court against the defendant, with an agreement to stay execution thereon until September Term, 1803. On the 28th of August, 1803, the defendant conveyed a parcel of land to Thomas Goldsborough, by deed *bona fide*, and for a valuable consideration. On the 28th of February, 1804, the writ of *feri facias* in this case issued on the plaintiff's judgment against the lands, &c. of the defendant, and was laid in part on the land so conveyed to Goldsborough, on whose behalf this motion was made by

Bullitt, who argued, that although the judgment was a lien on the land, it did not preclude the defendant from transferring it *cum onere*, and that a *scire facias* was requisite before a *feri facias* could issue. 4 *Bac. Ab. tit. Scire Facias*, (C. 5.) 114, 115; 2 *Salk.* 598, *pl.* 2; *Carth.* 111; 2 *Bac. Ab.* 353; 2 *Harr. Ent.* 749, 763.

\* Hammond and Carmichael, against the motion, contended, that a motion was not the proper mode of proceeding—That the defence, if there was any, would come out more properly in an action of ejectment to obtain possession by the purchaser, of the land purchased at the sale made under the *feri facias*; for there the fraud, if there was any, might more properly be inquired into. They relied upon the general rule laid down in 2 *Bac. Ab. tit. Execution (I)*, "that lands are bound from the time of the judgment, so that execution may be of these though the party aliens *bona fide* before execution sued out." They also cited *Graff vs. Smith's Adm'rs*, 1 *Dall. Rep.* 481, to shew that no *scire facias* was necessary in such cases by the law of Pennsylvania. **472**

Bullitt, in reply, contended, that fraud could as well be inquired into on this motion as in an action of ejectment. But in ejectment Goldsborough could not call on the terre-tenants, as he may by pleading to a *scire facias*. That if the statute of 5 Geo. II, ch. 7, puts a *feri facias* against real and personal property on the same footing, this *feri facias* cannot affect the land in question, being issued after it was conveyed; (b) but the land is bound by the judgment, and all

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(a) As between two executions, the sheriff should serve that first upon personal property which comes to his hands first; but that execution must be first served upon real property which is grounded upon the elder judgment. *Evans' Practice*, 478; *Hanson vs. Barnes*, 3 G. & J. 359; *Leonard vs. Groome*, 47 Md. 499.

(b) The Reporters have been furnished with a written opinion of the General Court, given by GOLDSBOROUGH, Ch. J. and CHASE and DUVALL, J. (sitting on the Eastern Shore,) in, it is believed, the case of *Hindman vs. Ringgold*. They however, have been informed, that one of the Judges, (Mr. CHASE,) on hearing the decision in this case mentioned, observed either that

**474** \* that the *bona fide* vendee can require, is an opportunity to show a meritorious defence.

CHASE, Ch. J. The return to the *fieri facias*, must be quashed, so far as it respects the land sold and conveyed by the defendant to Thomas Goldsborough, no fraud or collusion in the sale to him having been alleged.

The terre-tenant should have an opportunity to relieve himself, and to bring in the other terre-tenants—Hence the necessity of a *scire facias*, that all the terre-tenants may be warned.

On this motion as much may be brought out as in an action of ejectment, and more, as the Court have an equitable control.

*Return quashed.*

**475** \* GENERAL COURT, APRIL TERM, 1804.

THE STATE, use of WARDER vs. PAGE *et al.*

After a *fieri facias* has been laid, and before a sale of the property seized thereunder, a writ of error, bond with security having been approved, operates as a *supersedeas* to stay further proceedings under the *fieri facias*. (a)

the Court had overruled that decision, or, that they had given some explanation respecting it which more fully expressed the meaning of the Court.

The written opinion above mentioned is as follows, viz.

“The opinion of the General Court relative to the levying of executions.

“Before the Statute of 5 Geo. II, ch. 7, lands were not liable to be taken in execution. Under that Statute the houses, lands, negroes, and other hereditaments and real estates, within any of the British plantations, belonging to any person indebted to the king, or to any of his subjects, are made liable to the satisfaction thereof in like manner, as personal estates in any of the said plantations are seized, executed, sold or disposed of.

“By the Statute of 29 Car. II, ch. 8, s. 18, 14, it is enacted, that after the 24th of June, 1677, the day of entering or signing any judgment shall be entered on the margin of the record; and by section 15, judgments, as against purchasers, shall relate to such time only.

“By section 16 of the same Statute of Car. II, the execution against personal estate, first delivered to the sheriff, will have the preference; and as the Statute of Charles makes no difference but as to purchasers, this case remains as an execution at common law against personal estate, and therefore the execution first delivered will have the preference, and shall be first satisfied.” See *Ridgely's Ex'rs vs. Gartrell*, 3 Harr. & McHen. 449, decided by the same Judges.

(a) This case was overruled by *Beatty vs. Chapline*, 2 H. & J. 7, where it was held that after a *fi. fa.* has been laid and before a sale of the property seized thereunder, a writ of error, (bond with surety having been approved,) does not operate to stay further proceedings under the *fi. fa.* But in *Eagle vs. Smith*, 24 Md. 339, it was held that, under Code, Art. 5, s. 33, whether an execution has been in part executed or not, the filing of an approved appeal

IN this case a *feri facias*, which had regularly issued on the 27th of June, 1803, upon a judgment rendered in this Court, was laid on the defendant's personal property on the 19th July, 1803. A special return was made as to Henry Page, one of the defendants, viz. That the sheriff advertised that the property would be sold at public sale on the 29th of August, and on the 25th of August, 1803, a writ of error, endorsed, bond filed and securities approved, being produced to him, dated the 9th of August, he stayed proceedings.

Motion on the part of the plaintiff for a *venditioni exponas*.

*Houston and J. Goldsborough*, for the plaintiff, contended, that the *feri facias* having been laid before the issuing of the writ of error, the sheriff ought to have proceeded. 1 *Salk.* 323. That an execution is an entire thing, and the *feri facias* having been begun could not be superseded. *Cro. Eliz.* 597. That a record removed before sale, and a supersedeas delivered, yet *venditioni exponas* was allowed. 4 *Bac. Abr.* 648.

*Martin*, (Attorney-General,) against the motion, contended, that by the Act of Assembly of 1713, ch. 4, and the practice of this State, no writs of supersedeas actually issued; but bond being filed, the writ of error is a supersedeas from its date, and the sheriff is only in contempt for what he does after it is shewn to him. It stays proceedings in the situation in which it finds them—so finding one in custody on a *ca. sa.* or goods taken under a *fi. fa.* so injunction will stop proceedings in any stage. *Har. Pr. in Chan.* The execution is entire as to the sheriff so far as to permit him, and his representatives on his death, or death of the defendant, to complete it—and if goods are taken on a *fi. fa.* the writ of error enables the sheriff to return \* them, security being given. That the case in *Salkeld*, 323, was not a case of a writ of error, and that 476 cited from *Cro. Eliz.* 597, was of no weight even under the English law. It was decided, Hil. Term, 40 *Eliz.*; and *Moore's Reports* contain the same point, decided by two justices only, and is an anonymous case. That by *Roll. Abr.* 491, pl. 5, 6, (decided 17 *Jac. I.*) there is no change of property on the seizure by the sheriff under a *fi. fa.* where a supersedeas on a writ of error is delivered before sale. If the sheriff takes goods on *fi. fa.* and a writ of error is produced, it is a supersedeas. 2 *Bac. Abr.* 210. See note on *Cro. Eliz.* in the old editions of *Bacon's Abridgment*, which is omitted in the 5th edition.

*Houston and J. Goldsborough*, replied, that by the seizure the goods were in *custodia legis*, and the defendant discharged *pro tanto*. They denied the authority of the case in *Rolle's Abridgment*. The reason

bond shall stay any execution which may have been issued, and that a defendant may defer filing a bond until the last moment before execution is consummated, provided he has appealed in time. See Rev. Code, Art. 71, s. 63.

of which, viz. "that the property is not altered by the seizure," they said, was overruled in 1 *Salk*. 323, and 2 *Ld. Raym.* 1072-3, and they cited *Yelv.* 6, 61, 44, to show, that so far as the sheriff has taken goods under a *fi. fa.* he must sell. That the delivery of the supersedeas shall stay for the residue not taken in the sheriff's hands. That if, before a writ of error, the sheriff has taken goods and returned them on hand *pro defectu emptorum*, the execution is not to be undone. 1 *Ventris*, 255, (in 25 and 26 *Car.* II,) per Lord Hale; and Holt's opinion, 2 *Ld. Raym.* 990; also 4 *Bac. Abr.* 684, which cited the case in *Roll. Abr.*

\* CHASE, Ch. J. delivered the opinion of the Court. The writ of error operates as a supersedeas from the time of filing 477 the bond; and if no sale was then made by the sheriff, it prevents and stays him making sale. The Court therefore refuse to order a *venditioni exponas* in this case.

The sheriff has a special or qualified property in the goods seized under a *fi. facias*; they are from that time in the custody of the law, and the property is not absolutely altered until a sale made by the sheriff.

*Motion refused.*

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GENERAL COURT, (E. S.) APRIL TERM, 1804.

PATTON and JONES vs. WILMOT.

Whether or not due diligence has been used by the indorsee of a promissory note to recover the money from the drawer, is a question of law. (a) Where there has not been due diligence, a subsequent promise by the indorser to pay the note will make him liable.

ASSUMPSIT by the indorsee against the indorser of a promissory note.

*Hammond*, for the plaintiff, cited 2 *T. R.* 217; *Esp. N. P.* 57.

*Bullitt*, for the defendant, cited *Esp. N. P.* 54; 1 *T. R.* 67; *Kyd. on Bills*, 119.

CHASE, Ch. J. There has not been due diligence used to recover the money from the drawer of the note, and it is the province of the Court to determine whether or not due diligence has been used. The jury therefore must find their verdict for the defendant, unless it appears to them that the defendant has subsequently promised to pay the amount of the note to the endorsee.

*Verdict for the Defendant.*

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(a) Affirmed in *Bell vs. Bank*, 7 Gill, 232, and in *Staylor vs. Ball*, 24 Md. 201. Cf. *Philips vs. McCurdy*, ante, 187.



\* GENERAL COURT, (E. S.) APRIL TERM, 1804. **478**

WALLIS' Ex'r *vs.* BRITTON *et ux.*

A second husband, surviving his wife who was administratrix of her first husband, is a competent witness for her surety in an action on the administration bond.

APPEAL from Queen Anne's County Court. The second husband, surviving his wife who was the administratrix of her first husband, was offered as a witness at the trial in the County Court, by the executor, (the appellant,) of a co-obligor in her administration bond; but was rejected by the County Court, and this appeal was prosecuted.

At the argument in this Court, the following cases were cited:—  
1 *T. R.* 163; 4 *T. R.* 17; 5 *T. R.* 667; 2 *East*, 561.

The General Court reversed the judgment of the County Court.

GENERAL COURT, (E. S.) APRIL TERM, 1804.

PHILIPS *vs.* DASHIELL'S Lessee.

Where a testator by his will had devised to his heir at law the same estate in lands which he would have had by descent—*Held*, that he took by descent and not by purchase. (a)

APPEAL from Somerset County Court. The appellee brought an action of ejectment, and the following case was submitted for the decision of the County Court, viz. Levi Dashiell being seized in fee, (amongst others,) of part of a tract of land called First Choice, by his will, dated the 27th February, 1786, devised one-third of his real and personal estate to his wife during her widowhood; remainder as afterwards to be expressed in his will, viz.—“To George Dashiell, my son, all my part of the tract of land called First Choice, containing 100 acres, bequeathing all my right to one-third part of my personal estate to him and his heirs for ever.” On the 20th March, 1786, Levi Dashiell died, leaving a widow, and two sons, George, (the eldest,) and Henry, both minors. George Philips, (the defendant in the County Court,) their maternal grandfather, entered into possession of the \* land as guardian to the minors. The widow soon afterwards married William Philips, and had issue Peregrine **479** and Eleanor. In 1796 and 1797, Henry Dashiell and George Dashiell, both died minors and intestate. Henry died first. Henry Dashiell,

(a) Affirmed in *Medley vs. Williams*, 7 G. & J. 71, and in *Posey vs. Budd*, 21 Md. 480. See *Donnelly vs. Turner*, Oct. Term, 1882.

the lessor of the plaintiff, was brother of the whole blood to Levi Dashiell, the testator, and brought this action of ejectment against George Philips, (the appellant,) who defended for Peregrine and Eleanor, brother and sister of the half blood of George Dashiell, the devisee, and had judgment there, from which judgment is the present appeal.

*J. Bayly*, for the appellant, contended, that George Dashiell took by devise and not by descent. The devise to the widow confirms it. He was devisee in fee, not for life. He relied on the Act of Descents 1786, c. 45, s. 1, which marks the distinction between descent and purchase, and gives to the half blood where the estate is acquired by purchase.

*J. Dennis*, *contra*, cited *Pow. on Dev.* 428, 430, 432-435.

By the COURT, George Dashiell took by descent, not by purchase.  
*Judgment affirmed.*

#### 480 \* GENERAL COURT, MAY TERM, 1804.

BROSIUS *vs.* REUTER *et al.*

*A mandamus* cannot issue without notice from the Court to the opposite party. (a)

The form of such notice.

THIS was a motion for a mandamus to restore the plaintiff to the possession of a church, &c. grounded upon a notice given by him to the defendants, previous to the sitting of the Court. The depositions of several witnesses were read to the Court, to show that the plaintiff had been illegally expelled from the church mentioned in the motion, called The Saint John's German Catholic Church of Baltimore, by the defendants, and that the defendants were in the possession of the same wrongfully. The question for the decision of Court, on the motion, was, whether a mandamus could issue, as the notice to the opposite party did not emanate from the Court, but was given by the plaintiff to the defendants in April last, of his intended application to the Court at the present term for a mandamus to be restored, &c.

*Hollingsworth* and *Harper*, for the plaintiff, stated, that the rule to show cause was not a matter of course, but that the Court in a plain case, as they held this to be, would issue a mandamus without

(a) Approved in *Motter vs. Primrose*, 23 Md. 501. See *Runkel vs. Wine-miller*, 4 H. & McH. 276.

notice; especially as the notice which had been given in this case was sufficient to prevent surprise. They cited *Bac. Ab. tit. Mandamus*.

*Martin*, (Attorney-General,) *contra*. Regular notice should go from the Court, and no out of door notice could, he contended, be taken notice of.

\*CHASE, Ch. J. The Court think the regular way is to obtain a rule from the Court on the party to show cause, &c. 481 This was the practice in the case of *Eunkel vs. Winemiller et al.* 4 *Harr. & McHam.* 429. The party is not bound to take notice of any *ex parte* notice to appear, &c.

Let the rule go to the first day of the next term.

And it was "ruled by the Court, that the Reverend Cæsarius Reuter, &c. &c. of Baltimore County, and each of them, show cause by the first day of the next term of the General Court, to be held at the City of Annapolis on the second Tuesday of October next, why the writ of the State of Maryland should not issue directed to them, requiring and commanding them, and each of them, to restore, or cause to be restored, the Reverend Francis Xavier Brosius to the possession, occupation and use of the church, belonging to the religious congregation called The Saint John's German Catholic Church of Baltimore, and of the pulpit and altar of the said church, and of the parsonage house thereof, and of all and singular the effects, property, rights, privileges, liberties and functions, to the said church, altar and pulpit, and to the office and duty of rector or priest of the said congregation, in any wise belonging."

At the next term, (October, 1804,) on the first day of the term, the defendants not appearing in person, or by counsel, the rule was made absolute, and a mandamus ordered. There was proof of the service of the rule on each of the defendants; and other affidavits, &c. were filed.

\* GENERAL COURT, MAY TERM, 1804.

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WHETCROFT'S Adm'r *vs.* DORSEY'S Ex'rs.

If an appeal or writ of error be dismissed by the appellant or plaintiff in error, a second appeal or writ of error, though bond be filed, &c. will not operate as a *supersedeas*, where the first appeal or writ of error was a *supersedeas*. (a)

(a) See Rev. Code, Art. 71, secs. 61-67; *Evans' Prac.* 461. In 2 *Poe's Prac.* sec. 651, it is said that in cases where, in consequence of a failure to comply with the requirements of the Code touching appeals, execution has been issued or is threatened, the difficulty may be obviated by dismissing the pending appeal and taking a new one in due form, and that the contrary

MOTION by the plaintiff for a writ of *feri facias* upon a judgment rendered in this Court at October Term, 1801. It appeared that the defendants had appealed from the judgment above mentioned to the Court of Appeals, and had filed a bond agreeably to law to stay the issuing of any execution on the judgment. That the defendants caused a transcript of the proceedings to be sent to the Court of Appeals, and at November Term, 1803, they dismissed their appeal and afterwards obtained an injunction from the Court of Chancery to stay all proceeding on the judgment—which injunction was dissolved on the 13th of March, 1804, and the original order of the Chancellor, dissolving the injunction, was produced to the clerk of this Court, and a *feri facias*, by order of the plaintiff, was issued on the judgment. Upon the suggestion of the defendants to the Chancellor that a certificate by the register of the dissolution of the injunction, and not the original order, should have been produced to and acted on by the clerk of this Court, the Chancellor passed an order staying all proceedings on the *feri facias* which had issued; but as the injunction which issued under that order stated that all proceedings on the judgment were stayed, on application of the plaintiff to the Chancellor, he passed an order declaring that his intention, in awarding the last injunction, was only to stay proceedings on the *feri facias* which had issued, and that there would be no contempt of the Court of Chancery in proceeding on the judgment, otherwise than by proceeding on the said *feri facias*. Upon the Chancellor's last order the plaintiff applied to the clerk of this Court for another *feri facias* upon the judgment; but the clerk declined issuing it without the order of this Court, inasmuch as a writ of error had been produced to him by the defendants, endorsed "bond filed and the securities approved" by the Chancellor.

**483** \* The question for the decision of this Court was, whether the writ of error, so obtained, would stay the execution upon the judgment, the party having once before had the proceedings before the Court of Appeals by way of appeal, and having by his own act dismissed the appeal.

*Shaaft*, for the plaintiff. The case of *Buller vs. Lusitano de Pinna*, 2 *Stra.* 880, is in point. It was a writ of error by a *feme sole*, which abated by her marriage, and a second writ was brought by her, and her husband. The Court permitted the opposite party to take out execution; for it was the act of the plaintiff in error that occasioned the first writ of error to abate. If a writ of error abates in Parliament, a second writ of error in the same Court is no *supersedeas*. *Duncomb's Case*, 1 *Mod.* 28, 5; see 1 *Vent.* 100; *Bernad.* 403.

*Martin*, (Attorney-General,) and *Ridgely*, for the defendants, declined saying anything.

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doctrine declared in the case in the text would hardly be upheld now, under the language of the Code.

CHASE, Ch. J. The Court are of opinion, that the writ of error obtained for the removal of the proceedings in this case to the Court of Appeals, is no *superseas*. The plaintiff may therefore have his execution notwithstanding the writ of error. *Motion granted.*

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GENERAL COURT, MAY TERM, 1804.

GIBSON vs. FLEMING.

Where in an action of assault and battery, the defendant pleads *son assault demesne*, the plaintiff can give no evidence of an assault except on the day laid in the declaration, and this, whether the defendant gives evidence in support of his plea or not.

APPEAL from the Frederick County Court. It was an action of assault and battery, brought by the \* present appellant against the appellee. *Son assault demesne* was pleaded, to 484 which the general issue was replied. The bill of exceptions taken at the trial below states, that the defendant opened the case, but offered no testimony to support his plea. That the plaintiff proved an assault within one year before the issuing of the writ, but did not prove an assault on the precise day laid in the declaration; and the plaintiff prayed the direction of the Court to the jury, that as the defendant had not offered to prove any assault committed on him by the plaintiff, at any time before the action brought, that the plaintiff was not confined to give evidence of an assault on the day laid in the declaration. But that, if the jury believed from the evidence that an assault was committed on the plaintiff by the defendant, at any time within one year before the issuing of the writ, that they must find for the plaintiff. But the County Court refused to give the direction; but were of opinion, and so directed the jury, that no evidence could be given by the plaintiff of any assault committed upon him by the defendant, upon any day except that mentioned in the declaration. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this Court.

*Shaaff*, for the appellee. The point in this case was decided in this Court in the case of *Miller vs. M'Kee*, 3 Harr. & McHen. 593.

*Nelson, contra.* In *Miller vs. M'Kee*, evidence was offered by the defendant to support his plea of *son assault demesne*, but in the present case no evidence whatever was offered of any assault by the plaintiff on the defendant.

The General Court affirmed the judgment of the County Court.

**485** \* GENERAL COURT, MAY TERM, 1804.CONTEE *vs.* BEALL.

A general demurrer, or any plea going to the merits, will be received at any time to save a *non pros.*

DEBT on bond. The defendant having filed his plea at the last term, had a rule laid on the plaintiff to reply by the rule day, the 20th of February last. At this term, the plaintiff not having filed his replication,

*Van Horn*, for the defendant, moved for a judgment of *non pros.* under the rule.

*Buchanan*, for the plaintiff, offered to enter a general demurrer to the plea, which was objected to by the defendant's counsel.

THE COURT. This Court will receive the general demurrer, or any plea going to the merits, in order to prevent a *non pros.*

## GENERAL COURT, MAY TERM, 1804.

BUTCHER *vs.* NORWOOD.

Where the Court of Appeals affirms a judgment of the Court below, without awarding interest by way of additional damages, in an action on the appeal or writ of error bond, interest can be recovered only from the time of the affirmance. (a)

On the affirmance of a judgment rendered in the Court below in an action of assault and battery, interest by way of additional damages may be awarded.

DEBT upon an appeal bond, for prosecuting an appeal from a judgment of affirmance rendered in this Court, to the Court of Appeals. General performance was pleaded, and the plaintiff replied the recovery of a judgment in Baltimore County Court, on verdict, in an action of assault and battery, which was removed to and affirmed in this Court, and also removed to and affirmed in the Court of Appeals. The general issue was joined. The question was whether, as the judgment had been affirmed in this Court and in the Court of Appeals without interest, or damages by way of interest having been assessed in either of the Courts, the plaintiff, upon the appeal bond, could recover interest from the time when the judgment was rendered in the County Court?

(a) See Rev. Code, Art. 64, s. 124; *Balto. vs. Sewell*, 37 Md. 455.

*Key*, for the defendant. *Harper*, *contra*.

\* CHASE, Ch. J. If the Court of Appeals had been applied to for that purpose, they would have assessed additional damages for the interest which had accrued from the time of the recovery of the judgment in the County Court, to the day when they affirmed the judgment on the appeal from the General Court. But it appears that the judgment of the General Court was affirmed with costs only. Non-payment of this judgment is a breach of the condition of the appeal bond, and is only covered by the penalty. The Court are of opinion, that the plaintiff in this case can only recover in this action interest from the day when the Court of Appeals affirmed the judgment of the General Court. See 2 *T. R.* 58. 487

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GENERAL COURT, MAY TERM, 1804.

HAZELDINE'S Adm'r vs. WALKER'S Ex'rs.

A *scire facias* may be amended where a clerical error has been made, stating the judgment to have been obtained in 1797 instead of 1787. (a)

THIS was a *scire facias* issued out of this Court on a judgment rendered therein. *Nul tiel record* was pleaded.

*Kilty*, for the plaintiff, moved to amend the writ of *scire facias*, the clerk having stated in the writ that the judgment was obtained in October, 1797, when in fact it was obtained in October, 1787. He produced the titling directing the *scire facias* to issue, on which titling were the minutes of the clerk made at the time of giving the titling, and in the presence of the counsel referring to the judgment as of October Term, 1787. There did not appear to be any other judgment obtained in this Court by the plaintiff against the defendant.

\* THE COURT ordered the *scire facias* to be amended by the striking out the word ninety and inserting in lieu thereof eighty. 488

Leave was given to the defendants to plead *de novo*, and the cause was continued.

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(a) See *Reintzell vs. Beatty*, 3 H. & McH. 5; *Prather vs. Manro*, 11 G. & J. 261.

## GENERAL COURT, MAY TERM, 1804.

SALMON *vs.* YATES.

Under the Act of 1778, c. 21, no agreement for the stay of execution on a judgment, which is not entered on the docket at the time the judgment is rendered, can make it unnecessary to issue a *sci. fa.* to revive the judgment when a year and a day has passed from the time such judgment was rendered. (a)

A MOTION was made, and a rule obtained at the last term, at the instance of the assignees of the defendant, who had been declared a bankrupt, on the plaintiff, to shew cause at this term why three writs of *fieri facias*, (two of which were laid,) ought not to be quashed. Affidavits were filed.

*S. Chase, Junr.* for the assignees, at this term, stated that three judgments were obtained in this Court at May Term, 1802, by the present plaintiff against Yates, the defendant, and that a stay of execution until the 1st of August, 1802, was entered in each case. That an agreement was entered into between the plaintiff and defendant, that the plaintiff should take notes, and that notes were paid on the 7th August, 1802. That an agreement to stay executions beyond the time given on the record, was signed by both parties, but not entered on the docket, dated the 2d August, 1802, and filed in this Court, on the 14th of September, 1803, when orders were given for taking out the writs of *fieri facias* in these cases, which writs issued on the 17th September, 1803, and two of them were laid on the property of the defendant on the 29th September, 1803. He stated, that the question then was, whether  
 489 it was competent for the parties, by a private agreement \* not entered on record, to stipulate relative to an extension of the stay of execution, so as to enable the plaintiff to sue out executions after a year and a day from the expiration of the stay entered of record?

If a plaintiff, after a year and a day, sue out execution without having first issued a *scire facias*, it is void. *Russell's Case*, 4 *Leon.* 197; *Blayer vs. Baldwin*, 2 *Wils.* 82; 6 *Mod.* 288. The Court cannot notice any agreement respecting the stay of execution which has not been regularly entered on the record. The presumption is that the judgment is satisfied unless it appears by the record that the party can take out execution. 3 *Blk. Com.* 421. Third persons have become interested, and the Court will not countenance any such agreement to prejudice innocent persons. The Legislature saw this inconvenience, and they intended to guard against it by the

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(a) See Rev. Code, Art. 64, s. 135.



Act of October, 1778, ch. 21, s. 7, which provides that the stay must be entered on the docket at the time of entering the judgment.

*Hollingsworth*, for the plaintiff. This is an application to the discretion of the Court. All judgments, at the time they are entered, are by an agreement of the counsel long practiced and used in this Court, subject to a certain stay, viz. judgments entered in May, until the 1st of August then next, and those entered in October until the 1st of January following. In this case the usual stay was entered until the 1st of August, 1802, after which notes were given in payment, and an agreement entered into, that executions were further to be stayed, and only to be issued on default of payment of the notes. The reason why a *scire facias* issues, is to give an opportunity to the party to shew a payment; no such reason existed in this case, as the stay was altogether an indulgence to the defendant, and granted at his own request. It is competent for the parties to extend the stay, and the Act of October, 1778, ch. 21, does not forbid a private agreement to that effect.

\* CHASE, Ch. J. The Act of October, 1778, ch. 21, s. 7, is very plain and explicit, that the stay of execution must be entered on the docket at the time the judgment is entered, in order to warrant an execution being issued thereon, without a *scire facias*, after a year and a day have expired. In this case the stays not having been so entered, the executions could not legally issue, and therefore the Court quash the writs of *fieri facias* and returns, with costs. 490

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#### GENERAL COURT, MAY TERM, 1804.

##### WILSON vs. STARR.

The appearance of the defendant to an attachment, at the trial term, and his giving special bail after the garnishee has pleaded, and issue has been joined on such plea, dissolves the attachment, and the defendant is not bound by the plea of the garnishee, but may plead *de novo*. (a)

HABEAS CORPUS *cum causa* to Baltimore County Court.

*Hollingsworth*, for the plaintiff, moved for a writ of *procedendo*, stating that in this case there was an attachment on warrant which was laid in the hands of a garnishee, who appeared to the attachment and pleaded *non-assumpsit* and *nulla bona*, and issues were

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(a) Approved in *Spear vs. Griffin*, 23 Md. 431, where it was held that upon his appearance the defendant in an attachment has a right to plead for himself and is not bound by the pleas put in for him by the garnishee.

joined. That at the trial Court the original defendant appeared and gave special bail; the attachment was dissolved, and the present writ of *habeas corpus* produced and allowed. He contended, that a plea had \* been pleaded by the garnishee, for the original defendant, viz: non-assumpsit, and issue joined thereon; that the dissolution of the attachment did not strike out that issue or the plea. And that issue having been joined, a writ of *habeas corpus* could not be allowed. Therefore, that a writ of *procedendo* ought to be awarded.

CHASE, Ch. J. This is to be considered a new case against the original defendant. Upon his appearance, and giving special bail, by which the attachment was dissolved, he had a right to plead for himself, and the plea put in by the garnishee could not affect him.  
*Procedendo refused.*

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GENERAL COURT, MAY TERM, 1804.

MANRO *vs.* GITTINGS and SMITH.      /

Conveyances made to particular creditors in contemplation of insolvency—  
Held to be "undue and improper preferences," and therefore void under the Act of 1800, ch. 44, for the benefit of sundry insolvent debtors. (a)

ISSUES sent by the Chancellor to be tried by a jury under the direction of this Court:—

1. Whether or not the said Gittings & Smith, within two years before the 19th day of December, 1800, did convey to William Taylor, William P. Matthews, Thomas and Samuel Hollingsworth, and James Gittings, Jun. the whole or the greater part of their most valuable property with a fraudulent intent, thereby to give an undue and improper preference to the said grantees, or to the said grantees and other creditors?

2. Whether or not the said Gittings & Smith, within the time aforesaid, did convey and transfer to the said William Taylor, a vessel, purchased by them from John Chalmers, to secure the said Taylor from damage or loss on certain notes endorsed by him for them before their purchase of the said vessel, with a fraudulent intent by the said conveyance to give an undue and improper preference to the said Taylor?

3. Whether or not the said Gittings and Smith, and within the time aforesaid, after they had stopp'd payment, \* had a considerable quantity of merchandise belonging to or consigned to them, which arrived at the port of Baltimore, and delivered the same to Joseph P. Smith, brother of the said Smith the defendant,

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(a) See *McMechen vs. Grundy*, 3 H. & J. 185; Act of 1880, c. 172.

or permitted him to take and receive the same with a fraudulent intent, thereby to give an undue and improper preference to the said Joseph P. Smith, or any other person ?

On the trial of the said issues, or any of them, the Chancellor requested the Honorable the Judges of the General Court, on application of either party, to instruct the jury what ought to be considered an undue and improper preference.

The following statement of facts was agreed to by the counsel for the parties, viz: That the defendants, during the years 1798, 1799, and until the 20th of January, 1800, were merchants and partners, trading in Baltimore, by the name and firm of Gittings & Smith; that they contracted large debts, were possessed of a number of ships, and of goods and other property to a large amount, and were in good credit until the 29th of December, 1799, on which day they acknowledged, in a letter to the father of Smith, their apprehensions of being unable to pay their debts, and from that day until the 20th of January, 1800, when their insolvency was publicly known, made the several conveyances (copies of which are produced in Court,) with the intention of giving preference to the creditors mentioned in the said conveyances, if there should be a deficiency in their property to pay the whole of their said debtors. That all the parties to the said conveyances, at the time of executing them, did believe that the defendants were unable wholly to pay their debts, and that the said conveyances transferred the whole of the property owned by the defendants, as partners, at the time of their failure, and that they owned no other property but what is mentioned in their schedule. That the account of John Chalmers, one of the unpreferred creditors, as to dates, (2d December, 1799,) amount of notes, (\$6,200,) and time of payment; (\$1,900 at 90 days, \$1,900 at \* 120 days, \$1,900 at 6 months, and \$500 in cash,) is correct, and the vessel purchased of him is the same which was after- 494  
wards transferred to William Taylor and William P. Matthews on the 13th of January, 1800. That the defendants on the 10th of December, 1799, purchased of William Winchester 100 barrels of flour on a credit of 150 days, and about the same time another quantity of Beal Owings, on a like credit, which composed a part of the cargo of the brig Ann afterwards transferred to Thomas and Samuel Hollingsworth. That the defendants purchased of Thomas and Samuel Hollingsworth coffee and flour to the amount of \$17,153, and gave their four notes for the payment thereof, bearing date the 30th of October, 1799, at 3, 4, 5, and 6 months. That the conveyance to Thomas and Samuel Hollingsworth was made to secure the payment, or in a satisfaction for the above notes, and the rest of their account as furnished; and that the sum of \$10,000 cash was paid to the said defendants by the said Thomas and Samuel Hollingsworth, to enable the said defendants to go on with their business. That the conveyances to William Taylor and William P.

Matthews, of the 13th and 20th January, 1800, were made to secure the payment of certain promissory negotiable notes, bills of exchange, and custom house bonds, which the said Taylor and Matthews had signed and endorsed for the accommodation of the defendants at their request, and without having received any value therefor; which notes, bills and bonds, were not due at the time of executing the said conveyances, but have since been paid by the said Taylor and Matthews. That the statement of losses on the property conveyed to the said Taylor and Matthews, amounting to \$90,687 is correct. That The Dispatch and The Ranger, were attached in Great Britain, and never came to the possession of James Gittings, Junr. or John Yeiser, to whom they were consigned in trust. And that the said conveyance has been wholly inoperative. That the accounts of William Taylor and William P. Matthews, as to the debts due to them, are correct, viz: \* to the former \$24,344, and to the  
**495** latter \$12,187; and that the said Taylor and Matthews took possession of the property assigned to them, as soon after the execution of the deeds as they could.

It was agreed that the third issue be struck out.

*Harper and S. Chase, Junr.* for the plaintiff, moved the Court to instruct the jury, that the conveyances so made to particular creditors in exclusion of the rest, are fraudulent and void. They cited the statute of 13 Eliz. ch. 5, respecting fraudulent conveyances, which is to be liberally extended to suppress fraud. *Cowp.* 434. A transfer, giving undue preference, is void. 13 Vin. Ab. 518. The ninth section of the Act of 1800, ch. 44, "for the relief of sundry insolvent debtors," and amongst others the said Gittings and Smith, the defendants, is as follows: "That if any creditor, on the application of any such debtor to the Chancellor, or within two years thereafter, shall allege in writing, to the Chancellor, or to the General Court of the shore, or to the County Court of the county where such debtor shall reside, that such debtor hath directly or indirectly sold, conveyed, lessened, or otherwise disposed of, or purchased in trust for himself or any of his family or relations, or any other person or persons, intrusted or concealed any part of his property of any kind, or any part of his debts, rights or claims, with intent to deceive or defraud his creditors, or any of them, or to secure the same, or to receive or expect any profit or advantage thereby, or that he has passed bonds, or other evidences of debts, either without consideration or on improper consideration, or lost more than one hundred pounds current money by gaming at any one time, or hath assigned or conveyed, any of his property, with fraudulent intent, to give an  
**496** undue and improper \* preference to any creditor or creditors, or security, within two years before the passage of this Act, the Chancellor, &c. may, &c. or direct an issue or issues, &c. and if upon the trial of the said issue or issues by a jury, such debtor shall

be found guilty of any intentional fraud or deceit of his creditors, or loss by gaming as aforesaid, or of having given preference as aforesaid, he shall forever be precluded from any benefit of this Act," &c.

*Martin*, (Attorney-General,) and *Hollingsworth*, for the defendants. The Legislature meant, that due and proper preferences might be given. It is admitted that in this case there were preferences, but it is denied that they were undue, improper or fraudulent.

CHASE, Ch. J. The question rests entirely upon the Act of Assembly of 1800, ch. 44. That Act contemplated an equal distribution of property among the creditors.

\* The Court are of opinion, that the deeds were executed with a fraudulent design of preferring some creditors to others, and within the meaning of the Act, of giving "an undue and improper preference." 498

Verdict.—The jury find upon the first issue joined, that the said Gittings and Smith, within two years before the 19th of December, 1800, did convey to William Taylor, William P. Matthews, Thomas and Samuel Hollingsworth, the whole or the greater part of their most valuable property, with a fraudulent intent, thereby to give an undue and improper preference to the said grantees, or to the said grantees and other creditors.

The jury further find upon the second issue, that the said Gittings and Smith, within the time aforesaid did convey and transfer to the said William Taylor, a vessel purchased by them from John Chalmers, to secure the said Taylor from damages or loss on certain notes endorsed by him for them before their purchase of the said vessel, with a fraudulent intent by the said conveyance to give an undue and improper preference to the said Taylor.

The Court certified to the Chancellor as follows:

The Court do certify to the honorable the Chancellor, that they did instruct the jury on the trial of the first and second issues from the Court of Chancery, in the case in which Jonathan Manro was plaintiff, and Richard Gittings and Lambert Smith were defendants, that if the jury should find that the deeds from the said Gittings and Smith to William Taylor and William P. Matthews were executed after the said Gittings and Smith had it in contemplation to become insolvent, that the said deeds were to be considered as giving an undue and improper preference to the said W. T. and W. P. M. and that the jury, in conformity to the instruction of the Court, did find the said issues in the manner as above found.

J. T. CHASE,  
JOHN DONE,  
RD. SPRIGG.

LODGE *et al.* *vs.* MURRAY'S Heir and Devisee.

*Indebitatus assumpsit* for goods sold and delivered, will not lie against the heir at law of a debtor where the personal estate is insufficient for the payment of the debts of the deceased, and the heir has received by descent real estate more than adequate to their discharge. (a)

ASSUMPSIT for sundry matters properly chargeable in an account. The opinion of the Court was taken on the following question: Whether a creditor can maintain an action *indebitatus assumpsit* for goods sold and delivered, against the heirs at law of the debtor, where the personal estate is inadequate to the discharge of the debts of the deceased, and where the heirs at law have lands by descent from the deceased sufficient to satisfy the claims against him? If the Court should be of opinion that such an action can be maintained, then judgment to be entered for the plaintiffs. But if the Court should be of a contrary opinion, then judgment to be entered for the defendants.

W. Dorsey, for the plaintiffs.

Boyd, for the defendants.

CHASE, Ch. J. directed a judgment to be entered for the defendants.

## GENERAL COURT, MAY TERM, 1804.

JOHNSON *vs.* GOLDSBOROUGH.

A writ of error is not a *supersedeas* where the bond is not given in double the amount of the debt and costs recovered, or where the condition of such bond is, that if the plaintiff in error shall not prosecute such writ of error with effect, the bond shall not be void. (b)

In this case a judgment was entered in this Court at May Term, 1803, for £3,000 current money debt, and 536 wt. tobacco costs, to be released on payment of £1,459 current money, with interest from the 1st of December, 1800, and costs, with a stay of execution until the 1st of August, 1804. The defendant on the 10th of July, 1804,

(a) Approved in *Gist vs. Cockey*, 7 H. & J. 140. As to the rights of creditors when the personal estate of a decedent is insufficient to pay his debts, see *Warfield vs. Owens*, 4 G. 373; *Hammond vs. Gaither*, 3 H. & McH. 143, note; *Preston vs. Preston*, ante, 366; Rev. Code, Art. 66, s. 1.

(b) Approved in *Tucker vs. State*, 11 Md. 331, where it was held that an appeal bond, on which no recovery can be had by the obligee, cannot operate to stay execution.

produced a writ of error endorsed, "bond filed and securities approved."

*Shaaff*, for the plaintiff, at an adjournment of the Court, in August, 1804, moved the Court that a writ of \* *capias ad satisfaciendum* might issue on the above judgment, notwithstanding the writ of error which had been sued out on the said judgment. And he assigned the following reasons: 1. Because the bond filed in the Chancery office to stay execution is not in double the sum recovered, being £3,000 current money debt, and the quantity of 536 wt. of tobacco, costs; and the said bond is given in the sum of £6,000 current money only, which is not double the money and costs recovered. 2. Because the bond aforesaid, by the condition thereof, is made a nullity in this, that by the condition of the said bond, if the obligor, Goldsborough, shall not prosecute the writ of error or appeal with effect, &c. and in all things fulfil and pursue the directions of the Act of Assembly therein mentioned, and also pay and satisfy to the obligee, in case the judgment is affirmed, the amount of the said judgment, &c. then the said obligation is to be void. According to the tenor of which condition, if the obligor, Goldsborough, shall not prosecute the writ of error with effect, &c. that is, if the judgment shall be affirmed, &c. the said obligation is declared to be void; and by operation of law, if the said obligor shall prosecute the writ of error with effect, &c. that is, if the judgment shall be reversed, &c. the obligation aforesaid will become void; by which means the said bond will, in any event, become a nullity, and is not according to the Act of Assembly in such case made and provided.

Proof was made that a copy of the intended motion, and the above reasons, were served on the defendant's attorney on the 7th of August, 1804, with a notice that the Court stood adjourned until the 14th of August, 1804, when the motion would be made; and an attested copy of the bond entered into for prosecuting the writ of error was filed.

CHASE, Ch. J. It appears to the Court that the writ of error bond is not a *supersedeas*, and that the writ of *capias ad satisfaciendum* may issue, subject to \* any objections which the defendant may make thereto upon the return thereof.

*Ca. sa. ordered accordingly.*

## GENERAL COURT, MAY TERM, 1804.

## JARRETT'S Lessee vs. WEST.

A location made on the plots by one of the parties in an action of ejectment, and not counter-located by the other, is presumed to be admitted, and no evidence can be received against it. (a)

A patent issued by the Judge of the land office under a presumption that only certain lands are included in it, is good for so much of the said lands as are properly included.

The locations made by one of the parties in an action of ejectment, on a plot in another cause in which the other party was not interested, may be given in evidence against the party making them. (b)

Information, as to the boundary of a tract of land, derived from a person who was interested at the time, is not competent evidence in an action of ejectment for the party claiming under the person so interested.

HAWKINS vs. MIDDLETON, note:

A plot and proceedings in an ancient action of ejectment between parties under whom the lessor of the plaintiff in another action of ejectment claims, admitted in evidence for the defendant in such other action, to prove his location of the land on the plots.

EJECTMENT for the following tracts of land, viz. Contestable Manor No. 1, containing 1,302 acres; Contestable Manor No. 2, containing 144 acres; Jarrett's Disappointment, containing 115½ acres; and Little Contestable Manor, containing 200 acres; all lying in Harford County. The defendant took defence on warrant, and plots were made and returned. At October Term, 1803, the cause came on for trial, when a jury was sworn.

1. It appeared by the plots that the defendant took defence for the tract of land called Jarrett's Disappointment. The dispute was as to the beginning of a tract of land called The Hills of Poverty, which tract was located on the plots by the defendant. The plaintiff claimed Jarrett's Disappointment, as being included within the lines of Contestable Manor No. 2, which last mentioned tract was located differently by the parties. By the plaintiff's location a great part of Jarrett's Disappointment was included within the lines of Contestable Manor No. 2; but by the location made by the defendant it was entirely excluded. The plaintiff had not counter-located

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(a) By Rev. Code, Art. 64. s. 26, no counter-location is necessary to put the party locating any tract line, &c. on the proof of such location; and the opposite party may controvert the same without any counter-location.

(b) In *Rogers vs. Raborg*, 2 G. & J. 54, it was held that locations made by A. in an action of ejectment are admissible in evidence in another action of ejectment brought against those claiming under A. and who took defence for the same tract as that for which A's action was originally brought, although it was dismissed. See *Snively vs. McPherson*, 5 H. & J. 154; *Scott vs. Ollabaugh*, 3 H. & McH. 282; *Ridgely vs. Ogle*, 4 H. & McH. 86; *Reeves vs. Middleton*, 2 H. & McH. 272; *Evans' Prac.* 280.



The Hills of Poverty on the plots, within which tract the defendant contended Contestable Manor No. 2 lay, and which did not contain any part of Jarrett's Disappointment. The plaintiff contended that the Hills of Poverty included within its lines both tracts, Contestable Manor No. 2 and Jarrett's Disappointment, according to the locations of both the plaintiff and the defendant. But there was no location made on the plots of The Hills of Poverty showing that those tracts were so included.

\* *Mason*, for the defendant, prayed the Court to direct the jury, that as the plaintiff had not given any counter-location on the plots of The Hills of Poverty, the jury were to presume that the plaintiff admitted the location of that tract as made by the defendant, and that no evidence can be received against that location. **502**

CHASE, Ch. J. Where parties are contesting respecting the bounds of land, if a location is made by one party, and not denied or counter-located by the other, the location is presumed to be admitted, and the party is bound by it. It appears therefore by the plots, that the plaintiff admitted his lands not to be included within The Hills of Poverty by the locations which he has made.

*Johnson*, for the plaintiff, moved for leave to withdraw a juror for the purpose of amending the plots; which was granted, and the cause continued.

The plots being amended, the case came on again for trial at this term, May, 1804, when

2. *Hollingsworth*, for the defendant, read various orders made by the Chancellor, as Judge of the land office, on sundry certificates made on a survey of Contestable Manor, which are stated in the case of *West's Lessee vs. Hughes*, ante, 7. He said the last order of the Chancellor, which states that a patent might issue to Jarrett, the lessor of the plaintiff, on his recorrected certificate of survey of Contestable Manor, and that the certificate should be received of a certain day, was done under the idea that Jarrett had not included in his certificate of survey any land prohibited by the previous orders of the Chancellor. But that by the plaintiff's own shewing upon the plots in this cause, lands which ought not to have been included, had been included by Jarrett in his certificate. That as Jarrett had not complied with the Chancellor's order, the certificate should not be considered as returned on the day mentioned in the order.

\* CHASE, CH. J. It cannot affect the land properly included within the certificate of survey of Contestable Manor, which had been comprehended within the patent of The Hills of Poverty; **503**

nor can it affect the question of relation decided in the case of *West's Lessee vs. Hughes*.

3. *Martin*, (Attorney-General,) for the plaintiff, offered in evidence to the jury a plot, with the locations thereon, made upon a caveat in the land office, between Abraham Jarrett, brother of the lessor of the plaintiff, and the present defendant, which plot had been exhibited and filed in the Court of Chancery in a cause then depending in that Court between the parties in the present action, and carried, on appeal, to the Court of Appeals. This plot, he said, he offered in evidence to show, how the brother of the lessor or the plaintiff, owner of the adjoining lands, and the defendant, had located the lands now in dispute upon that plot, being different from the locations now made by the defendant upon the plots in this cause. This Court, he said, had repeatedly decided, that an old plot of the same lands, though not made between the same parties, may be given in evidence in any suit where the locations of the lands were in controversy. That it was to have such weight as the jury might think it was entitled to. He cited *Hawkins' Lessee vs. Middleton and Beane*, decided at May Term, 1785, (a) and *Reeves vs. Middleton*, 2 *Harr. & McHen.* 414.

**504** \* *Hollingsworth*, for the defendant, contended that the locations made upon the plot offered in evidence, were mere adverse locations of the other day. He admitted that an old plot may be given in evidence as traditionary testimony of long standing; but

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(a) The case of *Hawkins' Lessee vs. Middleton and Beane*, is in part reported in 2 *Harr. & McHen.* 119. It was an action of ejectment for a tract of land called Blew Plain, otherwise called Beau Plain, lying in Prince George's County. The defendant took defence on warrant, and plots were made, and the cause was tried in the General Court at May Term, 1785. The plaintiff at the trial produced a certificate of survey and grant of the land, and gave in evidence the will of Giles Blizzard, by which he devised the said land to his wife Mary, in fee, who afterwards intermarried with James Smallwood; also a deed from said Smallwood, and his said wife, to John and Ann Fraser, for the said land; and that after the death of the said Smallwood, the said Mary, his widow, together with John, and Ann Fraser, his wife, executed a deed of the land to Mary Fraser, who was the granddaughter of the said Mary Smallwood, and who afterwards intermarried with William Magruder, who, together with the said Mary, his wife, conveyed the said land to George Fraser, son and heir of the said John Fraser, and Ann, his wife, and uncle of the lessor of the plaintiff, and which said George devised the said land to the lessor of the plaintiff in fee. The defendant to prove his location of the said land on the plots, offered in evidence the proceedings and plots in an action of ejectment, commenced in the year 1736, by the said William Magruder, and Mary, his wife, against John Fraser. To which plot and proceedings the plaintiff objected: But the Court, (HARRISON, Ch. J.) was of opinion, that the same were proper evidence, and accordingly permitted the same to be read. The plaintiff excepted.

that this plot could not be considered as an old one, being of a recent date.

CHASE, Ch. J. The Court are of opinion, that the plot and locations may be given in evidence, so far as the locations were made by the defendant in this cause, or by his directions. But the other locations made by Abraham Jarrett, or by his directions, cannot be admitted in evidence to the jury. The evidence is admitted on the same principle as evidence of what the defendant did, and the jury are to judge of its effect.

The Court do not recollect decisions carrying the principle so far as to say an old plot may be given in evidence generally, to shew all the locations made by parties who are not parties to the suit at bar.

4. It was admitted that the land located upon the plots in this cause, called The Hills of Poverty, in the various positions in which the same is located, lies within the Lord Proprietary's reserves of land in that part of the then County of Baltimore, which lands were not liable to be affected in the ordinary way of taking up vacant lands. The plaintiff in order to make title to the lands mentioned in the declaration, produced and read to the jury a certificate of survey made by the surveyor of Harford County, for and at the instance of Abraham Jarrett, deceased, father of the lessor of the plaintiff, for the said land called The Hills of Poverty, bearing date in February, 1771. He \* also proved to the jury, that the lessor of the plaintiff is the eldest son and heir at law of the said Abraham Jarrett, who died before the year 1785, as to these lands, intestate. That in the year 1785, under the then existing laws, the lessor of the plaintiff claimed from the intendant of the revenue a right of pre-emption to the land called The Hills of Poverty. That he claimed such right of pre-emption as heir at law of his said father, and in virtue of the said certificate of survey, which right of pre-emption was allowed to him by the intendant of the revenue, and thereupon he became the purchaser of the said land from the State. He then produced evidence to prove that in or about the year 1785, the lessor of the plaintiff purchased of the intendant of the revenue the land included in the said survey called The Hills of Poverty. That in consequence of that sale a survey was made, and a certificate returned, bearing date the 22d of January, 1789, of the land he had purchased. That the said certificate was caveated, and an order passed to correct it. That different caveats were entered against a patent issuing for the said land, and that the Chancellor, as Judge of the land office, made different orders, until the 20th of December, 1797, when a patent issued to the lessor of the plaintiff, as appears by the said certificate of the 22d of January, 1789. For the orders and entries made thereon, and the several certificates and orders made afterwards, and for the

patent, see *West's Lessee vs. Hughes*, ante 7, before referred to. The plaintiff then, to prove the true beginning of The Hills of Poverty, produced and swore to the jury, Robert Amos, who deposed that in the year 1771, 1772, or 1773, he happened in company with the said Abraham Jarrett at the house of Benjamin Richardson, now deceased, when being asked where the beginning of Jarrett's survey called The Hills of Poverty was, Benjamin Richardson, pointing with his hand said, "it is over there on the back of my plantation, and between it and Indian Will's Cabin Branch;" that the said Abraham Jarrett then observed to the said Amos, that he, Jarrett, would go and shew him, Amos, where the \* beginning was; **506** that they, Jarrett and Amos, and no other person with them, rode in the direction to which Richardson had pointed, when Jarrett took Amos to several marked oaks, which he Jarrett told Amos was the beginning of his survey called The Hills of Poverty. That the trees were at that time newly marked, and were marked as boundaries usually are, and stood on the east side of Indian Will's Cabin Branch, about a quarter of a mile, perhaps something less, from the branch, and between it and Richardson's then plantation. Amos further proved that no other person ever showed him the said beginning, except as above stated, and that he hath no other knowledge of it. He also deposed, that on the morning of the day on which he derived the said information from Richardson and Jarrett, and before Richardson pointed out and showed in what direction the said beginning was, as above stated, both Richardson and Jarrett informed him, Amos, that he Richardson was interested in the survey called The Hills of Poverty, and was to have part of the land included in the said survey. Amos further proved, that he was present when the said Jarrett contracted with Robert Eden, Esquire, the Governor of the then Province of Maryland, for the land mentioned in the said survey, that by the contract Jarrett was to be the purchaser of the lands, and that he was to have the same at a price not exceeding £10 sterling money per 100 acres, but that it was stipulated by the Governor that the contract should not be entered on the books, or made public, lest it should injure the sale of the other reserved lands in that neighborhood. He further deposed, that at the place so shown to him by Jarrett as the beginning of The Hills of Poverty, there is, at this time, no tree, the land being cleared and in cultivation, but that the trees so shown by Jarrett did stand, when so shown, at the place designated, on the plots in this cause, by the plaintiff.

*Hollingsworth*, for the defendant, then prayed the Court to direct the jury, that the evidence so given by the said Amos, of information by him derived from the said Richardson and Jarrett, was **507** wholly incompetent \* in law, as proceeding from interested persons, and ought to be wholly disregarded by the jury. He cited the case of *Colston vs. Nicols*, ante 105.

CHASE, Ch. J. It appears that the father of the lessor of the plaintiff had a right of pre-emption in the tract of land called The Hills of Poverty, under the Lord Proprietary, which the State afterwards recognized. That he and Richardson both declared to the witness, that they were interested in the land, and declared each other interested at the time. The evidence as being derived from them is not proper to go the jury.

In the case of *Colston vs. Nicola*, decided in this Court on the Eastern Shore, the witness declared he was not interested at the time of the fact, but had become so since. This Court decided that his declarations of interest should not deprive the party of his right to his evidence; but this decision was overruled by the Court of Appeals.

*Verdict for the defendant.*

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GENERAL COURT, MAY TERM, 1804.

MITCHELL *et al.* Lessee vs. GOVER.

Where the plaintiff in an action of ejectment declares for a whole tract of land, and makes title to a part only, it is sufficient to locate such part on the plots, if there is no controversy about the location of the whole, and he may, on such partial location, read the patent in evidence. (a)

The declaration in ejectment being for a tract of land called Rupalta, and the title being for one called Repalta is no variance, if it be proved to be the same land. (b)

It seems, that where the lessors of the plaintiff in ejectment claimed as heirs at law under the Act of 1786, ch. 45, to direct descents, it is sufficient to count on a joint demise by all of them.

EJECTMENT for a tract of land called Rupalta, lying in Harford County. The declaration contained a joint demise by the whole of the lessors for the whole tract, and also separate demises by each of the lessors for the whole tract. The defendant took defence on warrant, and plots were returned, by which it appeared that the defendant took defence for all the land located by the plaintiff as his pretensions.

1. The plaintiff produced and read in evidence, a grant of the tract of land called Rupalta to Henry Stockett, on the 27th of June, 1661. The Rent Roll entries, shewing that Bagby and wife on the 31st of August, 1719, conveyed 150 acres, part of the said tract, to Samuel Gover. The will of Samuel Gover, dated the 10th of November, 1743, devising two tracts of land to his sons Samuel and Philip,

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(a) See Rev. Code, Art. 64, secs. 19, 24; Act of 1882, c. 372.

(b) Under Rev. Code, Art. 64, s. 27, it is no longer necessary to state the name by which lands may have been patented, but the same may be described by abutments, course and distance, by any name it may have acquired by reputation, or by any other description certain enough to identify the same.

**508** and the heirs \* of their body, and to the survivor. His son Samuel to take his choice of said tracts. That Samuel elected to take the other tract, and Philip took Rupalta. The Debt Book entries from 1752 to 1768, shewing that 150 acres of the land called Rupalta, had been charged to Philip Gover, and that Philip Gover died in possession of those 150 acres. He also offered a deed of mortgage of said land from Samuel Gover to James Mitchell, the father of the lessors of the plaintiff, dated the 9th of March, 1795, and further proved, that James Mitchell died in 1795, leaving the lessors of the plaintiff his heirs at law.

*Martin*, (Attorney-General,) and *Hollingsworth*, for the defendant, objected to the reading the grant in evidence, because the plaintiff had brought his ejectment for the whole tract, and had only made title to 150 acres, part of the tract, and had only located on the plots in the cause the part for which he had made title. If an ejectment is brought for the whole tract, the plaintiff claiming title to a part only, he must not only locate on the plots the part he claims, but also the whole tract. On the plots now before the Court, part of a tract of land only is located, and it does not appear that it is a part of Rupalta.

*Key*, for the plaintiff. The defence which the defendant has taken on the plots is an admission that the part of the tract located is a part of Rupalta. Where an ejectment is brought for the whole tract, there can be no doubt that less than the whole may be recovered—but more than the ejectment is brought for cannot. The defendant, by contesting the location, might have compelled the plaintiff to locate the whole tract; not having done so, there could be no necessity for incurring an unnecessary expense by locating that which was rendered unimportant in the decision of the question between the parties. The location therefore which the plaintiff has made must be considered correct, not having been denied by the defendant.

We admit that there is no location of the whole tract on the plots, and that no evidence of a \* deed can be given unless it is **510** located. The deed offered in evidence by the plaintiff is located. It is for a moiety of the tract, and a moiety is located. We have shewn title in Gover, and then locate his possession. He cited *Carroll vs. Norwood*, *ante* 100, 167.

*Martin*, (Attorney-General,) in reply. If a deed cannot be given in evidence unless it is located, how can a grant be read unless it is located? The same rule prevails with respect to the location of grants as to deeds; and no grant can be read in evidence unless it be located. In the case of the ejectment for a church in Frederick-Town, (Winemiller and others,) it was necessary not only to locate the lot on which the church stood, but also the whole tract. So in case an ejectment is brought for a lot in Baltimore, the whole of

Cole's Harbor must be located, unless by agreement the location of the whole is dispensed with. But here the defendant, for aught that appears, may be in possession of the other moiety of the tract for which the ejectment is brought.

CHASE, Ch. J. The Court do not recollect any case in which this question has been decided. The use of plots is to ascertain the thing in controversy—But in this case there is no question about location, as the part located by the plaintiff is admitted by the defendant. If there had been a counter-location, then it would have been necessary for the plaintiff to locate the whole tract. The Court are of opinion, that as there is no controversy about the location of the land for which the ejectment is brought, the defendant having taken defence for the land claimed by the plaintiff, it was not necessary for the plaintiff to have located the patent on the plots, although it is incumbent on the plaintiff to produce the patent in evidence to shew the land had been granted by the Proprietary.

2. *Hollingsworth*. The grant produced is for a tract of land called Rupalta. The declaration is for Rupalta, and the deed offered in evidence is for Repalta. The *allegata* and *probata* not agreeing, the plaintiff cannot recover.

\* *Key*. In the case of *Carroll vs. Norwood*, 4 *Harr. & McHen.* 287, the declaration was for Enlargement, and the patent produced was for The Enlargement, and it was decided to be no variance. There is a mere mistake in spelling the name. The gentleman last up entertained us the other day with a friend of his spelling the word "usage," *youczitch*, and "Jacob," *Gikup*. Suppose, for argument sake, his friend had by deed granted to his son *Gikup*, a tract of land called *Pat Youczitch*, and an ejectment was brought in the name of the son Jacob for the land called Bad Usage, by its patented name—How would the Court decide? 511

CHASE, Ch. J. The Court are of opinion that there is no variance between the name of the land mentioned in the grant, and that mentioned in the deed, so as to prevent the plaintiff from recovering.

3. *Hollingsworth*. It is stated that James Mitchell died in 1795, leaving the lessors of the plaintiff his heirs at law. The declaration states the demise in two ways, one a joint demise by all the children, and the other a separate demise by each for the whole tract. The plaintiff cannot recover under the first demise—nor can he recover under the second. The demise should have been by each of the lessors for one-seventh. The Act of 1786, regulating descents, vests in each of the heirs one-seventh part of the land, and not an estate in coparcenary.

*Key and Johnson, contra.* The first count is the proper one under the Act of 1786. Tenants in common are not known to exist by descent. Coparceners do. The first count is analogous to a demise made by coparceners. Although it is not in proof that the whole of the lessors are the heirs, yet sundry of them are proved to be the heirs. The others may not exist. The demise is \* to a fictitious person, and he is to recover. His lease is not invalidated, because it may happen that some one of the persons who had demised had no right. The estate which descends to heirs under the Act of 1786, is a nondescript estate. It is not analogous to any estate in England. It is not a joint tenancy, nor a tenancy in common. Daughters are parceners at common law; they take by descent; and and so in this case do the lessors of the plaintiff under the Act of 1786. There is no survivorship among coparceners, nor is there any under the Act of 1786. The plaintiff in this case may recover on the first count. It is a statute parcenary, not known to the common law, but regulated by Act of Assembly.

The counsel for the plaintiff moved for leave to amend, which the Court granted, and the cause was continued.

It does not appear that a new declaration was filed. But the plots were amended by the plaintiffs locating the whole tract in addition to his location of the particular part he claimed.

The defendant at May Term, 1805, confessed a judgment for possession and costs.

### 513 \* GENERAL COURT, MAY TERM, 1804.

HAWKINS *et al.* Lessee vs. BURRESS *et al.*

The omission of the words "ill usage," in the certificate of the acknowledgment made by a *feme covert* grantor, invalidates the deed, notwithstanding it was stated that she made the acknowledgment "of her own free will, and not through any threats of her said husband, or fear of his displeasure." (a)

A common recovery suffered before the Act of Nov. 1786, ch. 21, which was defective for the want of a good tenant to the *precipe*, was remedied by that Act, if any of the parties was a tenant of the freehold; and the execution of a lease for a year by the tenant of the freehold with a view to the suffering such recovery, does not incapacitate the lessor from being considered as the actual tenant of the freehold within the meaning of the proviso in the said Act of 1786.

Where there was sufficient evidence for the jury to presume that the lands mentioned in a deed to lead the uses for suffering a common recovery and the lands mentioned in the said recovery were the same; and that a resurvey made of certain tracts of land contained no more land than was included in the original surveys.

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(a) See *Webster vs. Hall*, 2 H. & McH. 14, note.



EJECTMENT on a joint demise, and on separate demises, for three undivided fourth parts (the whole to be divided into four equal parts,) of a tract or parcel of plantable land called Trent Neck, lying in Saint Mary's County, containing 2,354 acres. The defendants took general defence, and issue was joined.

1. The plaintiff offered in evidence to the jury a patent of confirmation for the tract of land called Trent Neck, the land in the declaration of ejectment mentioned, (though without name in the patent,) containing 2,354 acres, bearing date the 10th of September, 1716, granted to Thomas Trueman Greenfield, on a resurvey made of six tracts of land, viz. Trent Neck, 600 acres; Wedge, 75 acres; Refuse, 140 acres; Blackland, 175 acres; Suenton, 100 acres, and The Inclosure, 110 acres, on the 10th July, 1705. Also the will of the said Thomas Trueman Greenfield the patentee, dated the 3d of February, 1730, whereby he devised to his eldest son Thomas Trueman Greenfield, and the heirs of his body, all that the said tract of land called Trent Neck, containing 2,354 acres, provided he conform to the said will, and his mother's desire touching the land which descended to her by the death of her brother Kenelm Cheseldyne; but in case his said son Thomas, or any of his descendants thereafter, should molest, sue for and recover, the lands which descended to his mother, to the detriment of his son Kenelm, or his descendants, it was then his will that his son Kenelm, and the heirs of his body, should be immediately vested in a good and sure estate in fee tail, as expressed and intended, to his son Thomas, of, in and to all the surplus land which upon resurvey was found in those tracts mentioned in the patent of confirmation called Trent Neck, and that his son Thomas should take no benefit, either by himself or the heirs of his body for ever, of the said will, &c. and in case of failure of heirs of the body of his son Thomas, then the lands devised to him should descend \* to his son Kenelm, and the heirs of his body, &c. He further gave in evidence, that the said T. T. Greenfield, the testator, died on the 10th of February, 1733, leaving six sons and two daughters, all named in the said will, of which sons Thomas, the devisee, was the eldest and heir at law to the testator, and Kenelm Trueman Greenfield the devisee, in the same will named, was second son to the said testator. That the land in the will called Trent Neck is the same land in the declaration and in the said patent of confirmation mentioned. That T. T. Greenfield, (the son,) died without issue, and the said Kenelm survived him and entered upon the premises, and on the 21st day of March, 1749, duly executed a lease to a certain Robert Swann, "for all those several tracts or parcels of land called Trent Neck, containing 600 acres; Wedge, 75 acres; Refuse, 140 acres; Blackland, 175 acres; Suenton, 100 acres; and The Inclosure, 110 acres; all which said several tracts of land were reduced into one entire tract, by patent of confirmation granted to Thomas T. Greenfield the 10th

of September, 1716, and called Trent Neck, and containing 2,354 acres of land, lying in Saint Mary's County," &c. "To have and to hold all and singular the said premises, with the appurtenances, unto the said Robert Swann, his executors, &c. from the day next before the day of the date of these presents, for and during, and unto the full end and term of one whole year from thence," &c. "to the end and purpose that the said Robert Swann may be in the actual possession of all and singular the said bargained and sold land and premises, with," &c. "and may by force and virtue of the statute for transferring uses into possession," &c. "be enabled to take a grant and release of the reversion and inheritance of all and singular the said land and premises with," &c. "to him and his heirs, to such uses and purposes as shall be thereby declared." That afterwards, on the 22d of March, 1749, the said Kenelm and Robert Swann, and a certain John Estep, did duly sign, seal and deliver, and which was duly acknowledged and recorded, a certain deed of

**515** release in tripartite, made between \* the said Kenelm of the first part, the said John Estep of the second part, and the said Robert Swann, of the third part, for the docking, barring and extinguishing, all estates tail, and all reversions and remainders thereon expectant or depending, of and in the lands, tenements and hereditaments, viz. Trent Neck, 600 acres; The Wedge 75 acres; The Refuse, 140 acres; Blackland, 175 acres; Suenton, 100 acres; and The Inclosure, 110 acres; all which several tracts of land were reduced into one entire tract by patent of confirmation granted unto Thomas Trueman Greenfield, on the 10th of September, 1716, and called Trent Neck, containing 2,354 acres, &c. "To have and to hold all and singular the said lands and tenements, hereditaments and premises, hereby granted and released, or mentioned or intended to be granted and released with their and every of their appurtenances, unto the said John Estep, his heirs and assigns, to and for the use and behoof of him the said Robert Swann, his heirs and assigns, for ever, to the intent and purpose that he the said Robert Swann, may be perfect tenant of the freehold of the said premises, that a common recovery may be had and suffered against him in such manner as is hereinafter mentioned; and for that purpose it is covenanted, &c. that before the end of the next April Term, or some other ensuing term, &c. the said Kenelm Trueman Greenfield, one or more writ or writs of *entry sur disseisin en la post*, shall and may be brought, &c. out of his Lordship's High Court of Chancery, returnable, &c. in the name of the said John Estep as plaintiff and demandant, against the said Robert Swann as tenant, whereby the said John Estep shall demand, against the said Robert Swann, the said lands, &c. to which said writ the said Robert Swann shall appear, &c. and shall vouch to warrant the same premises to the said Kenelm Trueman Greenfield, who shall appear," &c. in the usual form of deeds leading uses, &c. to the proper use and behoof of the said K. T. Greenfield, &c. The

plaintiff also offered in evidence a record of a common recovery suffered in the Provincial Court \* at April Term, 1750, pursuant to the said deed, leading the uses, &c. in the name of the said **516** John Estep as demandant, against the said Robert Swann tenant, and Kenelm Trueman Greenfield, vouchee, &c. in the usual form, for "one tract of plantable land, lying and being in St. Mary's County, called Trent Neck, containing 2,354 acres, with the appurtenances," &c. And also a record of a writ of seisin, executed pursuant to the said recovery on the 15th of August, 1750. He further gave evidence that the said K. T. Greenfield, died possessed of the said land on the 10th of June, 1765, leaving two daughters, his only children and heirs, to wit, Margaret and Susanna. That the said Margaret intermarried with John De Butts, and the said Susanna intermarried with George Fraser Hawkins, who entered, &c. That Susanna survived her husband, and died intestate on the 1st of April, 1790. That Margaret also survived her husband, and died intestate, and without issue, on the 1st of June, 1798. That the said George F. Hawkins, and Susanna his wife, had the following children, to wit: John Trueman Hawkins, (the eldest son,) George Fraser Hawkins, Margaret Hawkins, and Susanna Greenfield Hawkins. That the said Margaret intermarried with Nathaniel Washington, and the said Susanna intermarried with Henderson Sim Butler, before this suit was brought; and that the said George Fraser Hawkins, Nathaniel Washington, and Margaret his wife, and Henderson Sim Butler, and Susanna his wife, are the lessors of the plaintiff in this suit.

The defendants then gave in evidence to the jury, that the said John De Butts, and Margaret his wife, and the said George Fraser Hawkins, and Susanna his wife, that is, the children of Kenelm the devisee, on the 29th of July, 1785, executed deeds of partition of the said land between them. And on the same day the said George Fraser Hawkins, and Susanna his wife, executed a deed of bargain and sale to John Trueman Hawkins, their son, for their moiety of the said tract of land called Trent Neck, for which the ejectment was brought; which said last mentioned deed was \* acknowledged as follows, to wit: "On the 29th day of July, 1785, came **517** George Fraser Hawkins, and Susanna Trueman his wife, before us, two of the justices of the peace for Saint Mary's County, and acknowledged the within instrument of writing to be their act and deed, and the land and premises therein mentioned to be the right and estate of John Trueman Hawkins, his heirs and assigns, for ever, after the death of the above said George Fraser Hawkins, and Susanna Trueman his wife. And the said Susanna Trueman being examined privately by us and out of the hearing of her said husband, acknowledged that she did the same of her own free will, and not through any threats of her said husband, or fear of his displeasure." That the said John Trueman Hawkins, the grantee

under said deed, afterwards entered and was possessed of the said land so conveyed to him, and was seized thereof as the law requires; and being so seized died intestate, leaving one son John Hawkins, his heir at law, an infant under the age of 21 years; and that the defendants in this cause are in possession of the said land for which the ejectment is brought, under and in virtue of the title of the said John Hawkins.

The plaintiff then prayed the opinion of the Court and their direction to the jury, that the deed aforesaid executed by the said George Fraser Hawkins, and Susanna Trueman his wife, to the said John Trueman Hawkins, their son, was insufficient and inoperative to convey a fee simple in the land in the said deed mentioned to the said John Trueman Hawkins.

*Mason*, for the plaintiff, read the Act of 1715, ch. 47, s. 11, to shew that material and essential words are omitted in the acknowledgment, viz. "ill usage by." He said, the Act of 1715 contains technical expressions, which could not be departed from without fatal error as it respects *femes covert*, whose right it intended to protect, and that the Act of 1797, ch. 103, in remedying defective acknowledgments, saved the cases of *femes covert*, and recognized the form prescribed by the Act of 1715.

**519** \* *Johnson*, in reply, said, he did not contend that the acknowledgment ought to bar the *feme covert*, if the law had not been substantially complied with. But he stated, that in the instance it had been substantially complied with. The rule of construction adopted by this Court in the case of *Hoddy's Lessee vs. Harryman*, 3 *Harr. & McHen.* 581, that the grantor should acknowledge the instrument to be his "act and deed," and that nothing short of that acknowledgment would make the deed valid so as to pass the estate intended to be conveyed, was reversed by the Court of Appeals, not in consequence of the Act of 1797, ch. 103, but wholly independent of that Act.

**520** \* *CHASE*, Ch. J. It is not for the Court to say what the words of the law ought to be—they must take them as they are. The Court think the acknowledgment certified is defective, and does not divest the estate of the *feme covert*, who was in this case grantor. They think the words "or ill usage by," are material; therefore, the Court are of opinion, and so direct the jury, that the acknowledgment of the *feme covert* is defective, the words "ill usage," not being inserted in the certificate of the justices who took the said acknowledgment; and that the said deed is inoperative to pass and transfer her interest in the said land. The defendants excepted.

2. The defendants then prayed the opinion of the Court, and their direction to the jury, that notwithstanding the said deeds of lease

and release preparatory to the execution of the said common recovery, and notwithstanding the said recovery, the estate tail created by the will of the said Thomas Trueman Greenfield remained in full force. And further, that if the said recovery was sufficient to dock the said entail, the plaintiff was only entitled to recover three-fourths of the land actually contained within the true location of the said original tracts, which were resurveyed into the survey on which the said patent was granted.

*Martin*, (Attorney-General,) for the defendants. Kenelm T. Greenfield, about to dock the estate tail in Trent Neck, by double vouchee, by way of a common recovery, on the 21st March, 1749, executed to Robert Swann a lease for a year for several tracts of land upon which a resurvey had been made, and called Trent Neck, in order to take a release to certain uses and purposes. To make a tenant of the *precipe*, a deed of \* release was executed on the day following; an indenture *tripartite*—Kenelm T. Greenfield of the first part, 521 John Estep of the second part, and Robert Swann of the third part, for the same lands mentioned in the lease—"to have and to hold all and singular the said lands and tenements," &c. "unto the said John Estep, his heirs and assigns," &c. To the intent that a common recovery by Estep against Swann should be had and suffered in the then Provincial Court. The *habendum* is to Estep, and one of the questions is, whether Swann is made a tenant of the *precipe* by the deed? The common recovery is defective for want of actual freehold in the possession of a tenant to the *precipe*. The Act of Nov. 1766, ch. 21, entitled, "An Act to aid defective common recoveries," does not cure this defect. K. T. Greenfield was not actual tenant of the freehold which is distinguishable from the legal tenant; for there could be no actual tenant of the freehold in a person who had not the possession of the land itself.

*Key, contra.* The common recovery, notwithstanding there is no tenant of the freehold, is good. The recovery was suffered in 1750, and the Act of Nov. 1766, ch. 21, was passed to aid any defects which may have occurred in the suffering of common recoveries. It provides "that all common recoveries heretofore suffered in the Provincial Court, by consent and agreement of the parties thereto, shall be good and available in law to all intents and purposes whatsoever, to dock and cut off any estate tail in any of the parties thereto, and bar the issue in tail, who can, could, or might claim as heirs of the body or bodies of any of the parties thereto, and also to bar those in reversion or remainder, who can, could or might claim in default of issue of the body or bodies of any of the parties to such recoveries, in the same manner as if such recoveries had been legally and formally suffered and executed, notwithstanding the tenant to the writ in any such recovery was not tenant to the freehold at the time of judgment rendered, or any other defect in drawing, suffering or

**522** executing any of the said recoveries; \* provided that some one or more of the parties to such recovery, at the time of such judgment, was actual tenant of the freehold in the manors, lands, &c. recovered, and the persons, or some of them, joining in such recovery, had a sufficient estate and power to suffer the same." This Act clearly takes in the present case, and aids any defect which may be in the proceedings. The lease, release and recovery, are all to be taken together as one act. The parties to the proceedings had a sufficient estate and power to suffer the recovery. But the deed is good independent of the Act of Assembly, as may be shown by the authorities. The *habendum* in the deed does not control the premises. The freehold is not in abeyance by a lease for a year. The fee and freehold are in the person who executes the lease for a year. The lease for a year does not take away the freehold from the lessor. 2 *Blk. Com.*

CHASE, Ch. J. The Court are satisfied that the Act of November, 1766, ch. 21, embraces the case before the Court, and unless this recovery is aided by that Act, no recovery has been aided by it. A common recovery is a mode of conveyance. The deeds of lease, release and common recovery, are all to be considered as one act. The intention of the parties was to create a tenant to the freehold; but the deed \* being inartificially drawn, did not do so. Supposing **523** the objection to the deed to be good, the freehold rested in K. T. Greenfield, who was a party to the conveyance, and unless a case like this is provided for, the Act is nugatory.

The Court are of opinion that the common recovery in this case is good and available in law to dock the estate tail created by the will of Thomas Trueman Greenfield. The defendants excepted.

3. *Martin*, (Attorney-General,) for the defendants. The next question is, whether Trent Neck, the original, or Trent Neck, the resurvey, is conveyed by the deeds of lease and release, and common recovery? The ejectment is brought for different land than that mentioned in the common recovery; and the plaintiff can only recover three-fourths of the land for which the common recovery was suffered, docking the estate tail. 2 *Burr.* 1134.

*Mason, contra.* It was heretofore the practice of the Land Office to permit persons to take up land by natural calls, without measuring the distance, by which more land was taken up than was intended to be granted, or than the party paid for. This gave rise to the Lord Proprietary's instructions prohibiting more than one boundary or call, and an attempt was made by the Proprietary to induce persons holding by the former mode to resurvey and pay for the surplus land included in their former grant, but no Court had ever questioned the grantee's right to such surplus whether he resurveyed his lands or not. The case of Thomas T. Greenfield was thus circumstanced, as may

be seen by reading of the grant, and no land is included in the grant of confirmation but that included in the original tracts upon which the resurvey was made, being the same lands included in the deeds of lease and release. The lease and release convey the tract of land called Trent Neck, the resurvey, and the common recovery was suffered for Trent Neck, containing 2,354 acres, and if the lease and release had been lost, the Act of Assembly cured the defect; therefore the recital in the lease is out of the question.

*Shaaff and Key*, on the same side.

\* CHASE, Ch. J. The Court are of opinion, that there is sufficient evidence to induce the jury to presume that the lands **524** conveyed, and the lands in the common recovery, were the same, and that the resurvey contains no more land than the original tracts.

The defendants excepted, verdict and judgment for the plaintiff. The defendants appealed to the Court of Appeals. But the case was compromised, and the appeal was dismissed at June Term, 1806.

\* COURT OF APPEALS, JUNE TERM, 1804. **525**

S. NORWOOD *vs.* E. NORWOOD.

Where a complainant in Chancery had obtained a decree establishing his right to the profits of a ferry—on another bill for subsequent profits, he referred to such decree, without exhibiting a record thereof, and obtained a decree, &c. which on appeal was reversed, although the defendant's answer admitted the former decree, &c.

APPEAL from a decree of the Court of Chancery, passed in favor of the complainant in that Court. The bill stated, amongst other things, "that a bill in Chancery was heretofore filed in this Court by your orator against the said Samuel Norwood, and by decree of the Court your orator's right to a moiety of the ferry landing and profits, was established and confirmed; that the defendant Samuel Norwood, was decreed to account for certain profits, and an account of profits was stated up to the 12th of April, 1799, as by said proceedings on record in the High Court of Chancery will appear; from which decree the said Samuel hath prosecuted an appeal to the High Court of Appeals, where the same is now depending." The proceedings referred were not exhibited and made a part of the proceedings in the case.

The answer of the defendant "admits that the complainant filed his bill in this Court against him, and that he obtained a decree for a moiety of the profits made at the ferry aforesaid; the amount of the decree, the time from whence the profits commenced, and when

they were closed by the decree, will appear by the decree itself, to which this respondent prays leave to refer, and that he has appealed from the decree to the Court of Appeals." From the decree which the Chancellor passed in this case in favor of the complainant, the defendant appealed to this Court.

*Harper and Johnson*, for the appellant.

*Key and Ridgely*, for the appellee.

The Court of Appeals, [JONES, POTTS and DENNIS, Judges,] reversed the decree of the Court of Chancery, being "of opinion that there is not sufficient evidence contained in the record to support the Chancellor's decree against the appellant, the original decree referred to in the bill of complaint not being exhibited and making  
**526** no part of the evidence in the Court below." \* Also decreed, "that the Chancellor dismiss the said bill without prejudice to the equity of the complainant, if any, and without costs."

#### GENERAL COURT, OCTOBER TERM, 1804.

##### STANDIFORD *et al.* *vs.* AMOSS.

The issue or increase of female slaves, born during the life of a legatee for life, is the property of the representatives of such legatee. (a)

APPEAL from Harford County Court in an action of replevin by the appellants against the appellee for the following slaves, viz: Rachel, Flora, Joshua and Charles.

The question decided by the County Court arose out of the following bequest in the will of William Standiford, dated the 30th of October, 1775, viz: "I give and bequeath unto my beloved wife Elizabeth, one negro woman named Rachel," &c. "for and during her natural life, and at her decease to be equally divided between her children, and which are now alive."

It was admitted that Rachel, one of the slaves for whom this action was brought, is the same woman mentioned in the above bequest, and was the property of the testator. After the testator's death his widow married James Amoss, the defendant, and she is now dead. The other slaves replevied were the children of Rachel, born during the life of Elizabeth the legatee for life, and after her marriage with the defendant. The plaintiffs are the persons to whom the testator bequeathed the property over, after the death of his wife.

The question was, whether the issue of the slave named Rachel, born during the life of the legatee for life, and after her marriage with

(a) Approved in *Hamilton vs. Cragg*, 6 H. & J. 18. See *Somerville vs. Johnson*, 1 H. & McH. 195, note.



the defendant, was the property of the defendant or of the plaintiffs?

The County Court gave judgment for the defendant, and the plaintiffs appealed to this Court.

\* *Hollingsworth* and *Montgomery*, for the appellants. *Johnson*, for the appellee. He cited 1 *P. Wms.* 502, 503; 2 *Com.* 527 *Dig.* 268, 269; 2 *Atk.* 217; *Dep. Com. Guide*, 91, and two cases decided in the Court of Chancery in this State. *Hebb vs. Wilson*, and *Reeder vs. —*; also *Scott vs. Dobson*, 1 *Harr. & McHen.* 160; and *Somervell vs. Johnson*, 1 *Harr. & McHen.* 348.

The General Court affirmed the judgment of the County Court.

## GENERAL COURT, OCTOBER TERM, 1804.

### CHENEY'S Lessee vs. WATKINS.

Although a deed cannot operate as a bargain and sale, it may operate as a feoffment, (there being words "give and grant,") if livery of seisin can be proved, and there may be circumstances from which livery may be presumed. (a)

(a) In *Matthews vs. Ward*, 10 G. & J. 448, the Court said that, although the Legislature had previously made livery of seisin unnecessary, when the deed was enrolled, yet it failed to make any provision for the enrolment of deeds of feoffment until 1786. Hence, it was held, in the case in the text, that a deed executed in 1726 could not operate as a deed of feoffment, without proof of livery of seisin, or such length of possession as would give rise to a presumption of livery of seisin. Cf. *Carroll vs. Norwood*, *ante*, m. p. 178. By Rev. Code, Art. 44, s. 6, neither livery of seisin nor indenting shall be necessary to the validity of any deed. Enrolment takes the place of livery of seisin. *Matthews vs. Ward*, *supra*. A deed which purports to have been made for divers good and valuable considerations, and also in consideration of the sum of ten dollars to the grantor in hand paid, &c. is legally operative as a deed of bargain and sale. *Maccubbin vs. Cromwell*, 7 G. & J. 157. A deed containing appropriate terms and professing to be made upon a money consideration, although the amount is merely nominal, is to be regarded as a deed of bargain and sale. *Brown vs. Renshaw*, 57 Md. 75. The effect of a deed of bargain and sale is, "that the vendor becomes seised to the use of the purchaser in fee, or for life, or for years, according to the limitations contained in the deed; and thereupon the statute executes the use, and invests the purchaser with the legal estate accordingly. Such a conveyance transferred a freehold in possession without livery, a reversion or remainder without attornment, and an estate for years without entry, which were all respectively necessary to the perfect creation of such estates at the common law." *Alexander's British Statutes*, p. 299. Cf. *Paca vs. Forwood*, 2 H. & McH. 110; *Calvert vs. Eden*, *Ibid.* 176. A deed will be construed as a feoffment or as a deed of bargain and sale as will best effectuate the intention of the parties. *Ware vs. Richardson*, 8 Md. 505. A conveyance by way of feoffment to A. and his heirs, to the use of him and his heirs, will give him the legal estate. *Brown vs. Renshaw*, 57 Md. 77. By Rev. Code, Art. 44, s. 2, all deeds conveying real estate which shall contain the

To constitute a deed of bargain and sale there must be a money consideration, or general words of consideration under which a pecuniary consideration may be averred—other land being expressed to be the consideration is not sufficient.

If "divers good causes and considerations" are used in the deed, without mentioning any specific consideration, the party may aver what the consideration was: and if money be averred as the consideration, it will make it a deed of bargain and sale. (a)

If the consideration is blood, marriage, or natural love and affection, the deed will operate as a covenant to stand seised.

If a deed will not have operation in one way, it may operate in some other way.

Neither the record of enrolment, nor a copy of a deed not directed by law to be enrolled, can be admitted in evidence. (b)

The record of a will not legally attested by three witnesses, is not legal and admissible evidence to prove that the testator claimed the land therein devised, and was in possession thereof, claiming title to the same. (c)

From great length of possession of the land, the payment of taxes, &c. the jury may presume a conveyance from the patentee, &c. (d)

**EJECTMENT** for a tract of land called Cheney's Hazard, lying in Anne Arundel County. The defendant took defence on warrant, and plots were returned. General issue pleaded and issue joined.

1. The plaintiff, by his counsel, read in evidence to the jury a patent for the tract of land called Cheney's Hazard, being the land in the declaration mentioned, granted to Richard Cheney on the 30th of May, 1663, for 100 acres more or less. He then offered evi-

names of the grantor and grantee, or bargainor and bargainee, a consideration in cases when a consideration is necessary to the validity of a deed, a reasonably certain description of the property, and the interest intended to be conveyed, shall be sufficient, if executed, &c. The word "grant," the phrase "bargain and sell," in a deed or any other words purporting to transfer the whole estate of the grantor shall be effectual to convey. *Ibid*, sec. 5, and see the form of a deed, *Ibid*, sec. 55.

(a) Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration only. An additional consideration may be proved which is not repugnant to the one mentioned in the deed. *Betts vs. Bank*, 1 H. & G. 175. A larger consideration of the same kind may be proved. *Cunningham vs. Dwyer*, 23 Md. 229. Cf. *Barter vs. Sewell*, 2 Md. Ch. 447; *Cole vs. Albers*, 1 Gill, 423; *Carr vs. Hobbs*, 11 Md. 285.

(b) A certified copy of a deed not required to be enrolled is not admissible in evidence. *Hurn vs. Soper*, 6 H. & J. 276; *Connelly vs. Bowie*, *Ibid*, 141; *Coale vs. Harrington*, 7 H. & J. 147; *Burgess vs. Lloyd*, 7 Md. 178; *Cole vs. Pennington*, 33 Md. 480. When a paper is not entitled by law to be recorded, placing it upon record does not operate as constructive notice. *Glenn vs. Davis*, 35 Md. 208.

(c) See Rev. Code, Art. 49, s. 27; *Randall vs. Hodges*, 3 Bl. 481; *Warford vs. Colvin*, 14 Md. 532.

(d) See *Lloyd vs. Gordon*, 2 H. & McH. 157, note.

dence to the jury to prove that the lessor of the plaintiff was the heir at law of the patentee.

The defendant then offered in evidence to the jury, a copy of the Rent Roll legally authenticated, viz: "100 acres, Cheney's Hazard, surveyed 24 Dec. 1661, for Richard Cheney, on the south side of South River. Poss. John Durbin."

#### ALIENATIONS.

"100. Patrick Symson from Samuel Burgess, and *uxor*. 17th February, 1719.

100. Richard Hill from Patrick Symson and Eleanor, *uxor*. 3rd November, 1724.

\* 100. David Macclefish, from Richard Hill, 4th April, 1726." **528**

He also offered in evidence the will of John Durbin, dated the 9th October, 1715, whereby he devised the said land called Cheney's Hazard, to his wife Elizabeth Durbin, "to be entailed upon the said Elizabeth, and her heirs, neither to be sold nor mortgaged if the said Elizabeth has heirs by her own body, and the said heirs live to the years of twenty-one, to enjoy the said land, otherwise the son of Dorothy Callingsworth to enjoy the said land for him and his heirs." He also offered in evidence a deed from Samuel Burgess, and Elizabeth his wife, to Patrick Symson, dated the 17th of February, 1719, for the said tract of land called Cheney's Hazard, in which will the devise from John Durbin to the said Elizabeth, who had intermarried with Burgess, is recited. The acknowledgment of said deed by Elizabeth, and her examination by a Justice of the Provincial Court who took the same, is that the said "Elizabeth, the wife of the said Samuel, who being by me secretly examined out of the hearing of her said husband, declared that she acknowledged within land and premises to be the right of the within named Patrick Symson, his heirs and assigns for ever, free from any threats or fears of her said husband's displeasure." (a)

The defendant also read in evidence a deed from Patrick Symson, and Eleanor his wife, to Richard Hill, dated the 23rd of November, 1724, for the said land. He then produced in Court the original land record book of Anne Arundel County, under the custody of the clerk of Anne Arundel County Court, and by him brought into Court, in which book was the record of a deed purporting to be a deed from Richard Hill to David Macklefish, dated the 4th of April, 1726, and offered to read from the said record book the enrolment and copy of the said deed, in the words following, to wit: "This Indenture, made this fourth day of April, Anno Domini one thousand seven \* hundred and twenty-six, between Richard Hill, of Anne Arundel in the Province of Maryland, practitioner in physic, **529**

(a) This deed was read as passing an estate for life of Samuel Burgess, it being admitted that the acknowledgment of the wife was defective.

of the one part, and David Macklefish, of the same county and Province, planter, of the other part, witnesseth, that the said Richard Hill, for and in consideration of two tracts of land, situate and lying in Anne Arundel County and Province aforesaid, one of which tracts containing one hundred acres, (being part of a tract of four hundred and fifty acres,) formerly granted unto Thomas Besson of this county, called Bessendon, and another tract of land, formerly laid out for Thomas Sutton, called Sutton's Addition, adjoining to the former, containing and laid out for twenty acres, both tracts containing one hundred and twenty acres more or less, as in the original certificates doth more at large appear—Hath given, granted, bargained, set over, sold and confirmed, and by these presents he, the said Richard, doth for himself, his heirs, executors, administrators and assigns, give, grant, bargain, set over, sell and confirm, unto the said David Macklefish, his heirs, executors, administrators and assigns, for ever, one tract of land laid out for Richard Cheney the twenty-fourth day of December, 1661, called Cheney's Hazard, lying in the county aforesaid, being about a mile west from the said Cheney's plantation, where he then lived, beginning," &c. "containing and laid out for one hundred acres of land more or less, now in the tenure and occupation of the said David Macklefish," &c. "to have and to hold the land and premises aforesaid, unto him the said David, his heirs, executors, administrators and assigns, for ever, to the only proper use and behoof of him the said David, his heirs, executors, administrators or assigns, and to no other use, intent, or purpose whatsoever. And the said Richard doth hereby covenant, promise and agree, to and with the said David, his heirs, executors, administrators and assigns, the land and premises aforesaid, according to the metes and bounds aforesaid, for ever hereafter against all manner of persons' claims whatsoever, to warrant and defend. In \* testimony,"

**530** &c. Signed by the said Richard Hill, and by him acknowledged on the 4th of April, 1726, before two of his lordship's Justices of Anne Arundel County Court.

*Martin*, (Attorney-General,) for the plaintiff, objected to this deed being read as a deed of bargain and sale, the consideration expressed therein not being money or blood, but land, which is not sufficient to constitute it a deed of bargain and sale. He said it might be read as a deed of feoffment if the original was produced and proved.

*Shaaff*, for the defendant, contended, that land is a good consideration, that foreign money or bank notes would be good, and that the deed may be read as a bargain and sale. That it may be read as a feoffment, without proof of its execution, as the original record book wherein the deed is recorded is produced in Court. He cited *Gittings vs. Hall*, (*ante*.)

*Martin*, (Attorney-General.) The deed may be a deed of exchange, and not necessary to be recorded. It cannot be read as a bargain

and sale. Land has never been considered as a sufficient consideration. Tobacco notes which pass current, and bank notes, are good considerations. To shew that it could not operate as a deed of bargain and sale for the want of a proper consideration, he cited 1 *Bac. Ab.* 463, 469; *Gilb. on Uses*, 50, 51, 82, 112, 296; 2 *Blk. Com.* 338.

*Shaff and Johnson, contra.* \* Before the statute of uses, 27 Hen. VIII, this deed would have raised a use effectual in equity. It will therefore now raise a use, and the statute will transfer the possession. The same words which would raise a use at common law, will make a bargain and sale, which is a real covenant, on valuable consideration. 2 *Inst.* 672. In 2 *Blk. Com.* 338, it is said there must be a "pecuniary consideration." What is pecuniary consideration? It is not merely money—it is the value of money. A valuable consideration, means a recompense given. *Shep. Touch.* 218. There must be a moneyed or other valuable consideration. *Shep. Touch.* 220; 1 *Bac. Ab.* 469, refers to 1 *Co. Rep.* 176; 22 *Viner*, 202; *Jenk.* 247; 2 *Stra.* 1228.

\* CHASE, Ch. J. It seems to be taken for granted by the counsel, that unless the deed can operate as a bargain and sale, it cannot operate at all. But the Court think differently, upon inspecting the deed. It may operate as a feoffment, (there being words "give and grant,") if livery of seisin can be proved, and there may be circumstances from which livery may be presumed. 532

It cannot be a deed of bargain and sale without money consideration, or unless there are general words of consideration under which a pecuniary consideration may be averred. If the consideration is blood, marriage, or natural love and affection, it will operate as a covenant to stand seised, as in 2 *Wilson*, 22, 23. If "divers good causes and considerations" are used, without mentioning any specific consideration, the party may aver what the consideration was. If money be averred as the consideration, it will make it a deed of bargain and sale.

The Court will lean towards giving validity to a deed. If it will not have operation in one way, it may operate in some other way.

These positions were laid down in this Court in the case of *Paca and Forwood*, 2 *Harr. & McHen.* 175. This, therefore, not being a bargain and sale, or deed directed by law to be enrolled, neither the record nor a copy is evidence.

\* The Court are therefore of opinion, that the said enrolment is no evidence, as the said deed could not operate as a deed of bargain and sale, there not being any money consideration expressed therein. The defendant excepted. 533

2. The defendant then produced in Court the original record book brought into Court by the register of wills for Anne Arundel County, in which book was recorded a paper, purporting to be the will of David Macklefish, dated the 6th of June, 1737, whereby he devised

the said land called Cheney's Hazard, to his wife Martha, for life, with remainder in fee to his son John, which said will appeared to have been signed, &c. in the presence of two witnesses. And he offered to read from the said book, the record of said will, to prove that the said David Macklefish claimed the land in question, and was in possession claiming title to it.

But the plaintiff's counsel objected to the reading of the record of the said will from the book aforesaid.

CHASE, Ch. J. The Court are of opinion that the record is not legal and admissible evidence to prove that David Macklefish claimed the land in question, and was in possession thereof, claiming title to the same, the said will not being attested by three witnesses. The defendant excepted.

3. The plaintiff, further to prove the issue on his part, after having read in evidence to the jury the grant for the tract of land called Cheney's Hazard, in the declaration mentioned, issued to Richard Cheney on the 30th of May, 1663, as before stated, gave evidence to the jury that said patentee died sometime in or about the year 1704, leaving Richard Cheney, his eldest son and heir at law, who was born on the 8th of March, 1682-3, and who on the 10th of December, 1707, married a certain Rachel Nicholson; that some time in or about the year 1709, they had a daughter of the name of Elizabeth, who in the year \* 1725, and before she was 21 years of  
**534** age married a certain Greenbury Cheney, by whom she had the said Zachariah, the lessor of the plaintiff, who moved from the State of Maryland upwards of forty-two years past, to Juniata in the State of Pennsylvania, and where he hath since resided. He further offered evidence, that the said Richard, the son of the patentee, was in his life-time in possession of said land, and lived on it, and that he died in or about the year 1713. He further gave evidence, that Elizabeth, the mother of the lessor of the plaintiff, died about the year 1751, in the life-time of her husband Greenbury and that he died about fourteen years past. He also proved the lease, entry and ouster, as laid in the declaration.

The defendant, in support of the issue on his part, produced in evidence the entries on the original rent rolls, which are before inserted; and read in evidence the last will and testament of the said John Durbin, or Durden, mentioned in the said rent roll, dated the 9th of October, 1715, whereby he devised the said land to his wife Elizabeth, in the manner before mentioned. He then produced evidence to prove, that the said Elizabeth Durbin, or Durden, after the death of her husband, on the 11th of April, 1716, intermarried with a certain Samuel Burgess, and that on the 17th of February, 1719, the said Samuel Burgess and Elizabeth his wife, executed a deed for the said land to one Patrick Sympton; and that Sympton and wife, on the 23d of November, 1724, executed a deed for the

same to one Richard Hill. He then offered to read in evidence to the jury, from the original land record book of Anne Arundel County, a deed from the said Richard Hill, to one David Macklefish, for the said land, dated the 4th of April, 1726, which the Court determined could not be read in evidence. He then offered in evidence to the jury the last will and testament of the said David Macklefish, bearing date the 6th of June, 1737, devising the said land to his wife Martha, for life, with remainder in fee to his son John, which the Court also rejected. He then offered proof that the said David Macklefish had several children, \* and that Richard Macklefish was his grandson, and heir at law, to whom the right to the said land descended; and that the said Richard Macklefish being seised of the said land as the law requires, on the 3d of March, 1763, conveyed the same to Joseph Howard, by deed dated on that day. He then offered evidence to the jury, that one Richard Burgess was the eldest son and heir of the aforesaid Samuel Burgess, and Elizabeth his wife, and that the said Richard Burgess, on the 23d of April, 1774, executed a deed for the said land to the said Joseph Howard. He then offered evidence to the jury to prove, that the widow of the said David Macklefish intermarried with one Ephraim Howard. And he offered in evidence the last will and testament of the said Joseph Howard, bearing date the 10th of December, 1777, whereby he devised the said land to Benjamin Howard, after the death of his widow; and that after the death of the testator the devisees entered on the said land called Cheney's Hazard; that the widow of the said Joseph Howard is dead, and that the said Benjamin Howard is also dead; that after the death of the said Benjamin Howard, a bill was filed in the Court of Chancery for the sale of his real estate for the payment of his debts, and that in the year 1794, a decree was made by the Chancellor for the sale thereof; under which the land in question was sold to and purchased by Nicholas Harwood. He also offered evidence that John Watkins, the defendant in this action, was at the time of bringing the suit, the tenant of the said Nicholas Harwood. That the said David Macklefish in his life-time was in the actual possession of the land, that after his death it was possessed by the said Ephraim Howard, and that the said Ephraim Howard is charged with the same on the Anne Arundel County debt books from the year 1753 to 1760; that John Macklefish, the devisee named in the will of the said David, is charged with the same on the said debt books from the year 1760 to 1766; and that Joseph Howard is also charged from the year 1766 to 1771; and that since that time the said Joseph Howard, Benjamin Howard, and those claiming under them, have possessed \* the same, and paid the taxes and dues on it. That no person by the name of Cheney, from the year 1710 to the present time, had been in possession of the said land; but that the same had been from that time held and possessed by the

said John Durbin, and wife, or those claiming under them. That there are now no debt books for Anne Arundel County to be found further back than 1753; and that the land records for Anne Arundel County were burned in or about the year 1705.

Whereupon the defendant prayed the opinion of the Court, and their direction to the jury, that if they are of opinion from the evidence aforesaid, that the facts aforesaid stated by the defendant are true, then, although they are also of opinion that the several facts stated by the plaintiff are also true, that they may and ought to presume that the said Richard Cheney, the patentee, or Richard Cheney his son and heir at law, in due form of law conveyed the same land in the declaration mentioned to the said John Durbin, or Durden.

CHASE, Ch. J. The Court are of opinion, that if the jury believe that Elizabeth Durbin, the devisee in the will of John Durbin, intermarried with Samuel Burgess, then there is a clear deduction of title, possession, &c. to presume a deed to John Durbin from the patentee, or from his son Richard; and the Court gave the direction to the jury as prayed by the defendant. The plaintiff excepted.

*Verdict and judgment for the defendant.*

#### GENERAL COURT, OCTOBER TERM, 1804.

##### STEUART vs. WEST, Garnishee of JENNERS.

Where the garnishee is indebted to the defendant by a promissory note, and an attachment is laid in his hands before such note is passed away by the defendant, whether it be before or after it is due, it is a lien on the amount of the note. (a)

(a) But in *Cruett vs. Jenkins*, 58 Md. 217, it was held that where the maker of a promissory note is summoned as the garnishee of the payee or endorser, the plaintiff in the attachment is not entitled to a judgment of condemnation, if it appear that the note, either before or after the service of the attachment, has been transferred or endorsed over to a third person, before its maturity for value, and without actual notice to him of the attachment. In this case the Court says: "In *Steuart vs. West*, the debt of the garnishee to the defendant was evidenced by a negotiable promissory note, and the attachment was supported. But it does not distinctly appear from the report of the case, that the note was in the hands of a *bona fide* endorsee for value, who received it before maturity. The case is very briefly reported. No opinion was given by the Court of Appeals showing the ground upon which their decision rested. We do not think the case can be considered as a distinct adjudication of the question now before us." The case in the text is examined in *Somerville vs. Brown*, 5 Gill, 408, which case is overruled by *Cruett vs. Jenkins*.



APPEAL from Prince George's County Court. The appellant, on the 14th of June, 1800, issued out of the said Court, on a judgment rendered there, in which he was plaintiff, and the said Jenners defendant, a writ of attachment, which was on the 15th of June, 1800, laid in the hands of Stephen West, the present appellee, as garnishee, who appeared and pleaded *nulla bona*, to \* which the general replication was entered and issue joined. At the trial of the issue the defendant produced and read in evidence the following promissory note and indorsements, viz.

"\$100.

April 14, 1800.

Sixty days after date I promise to pay Mr. Abiel Jenners, or order, one hundred dollars, negotiable at the Bank of Columbia, for value received.

STEPHEN WEST.

For value received I do hereby assign over all my right, title and interest, to the within note, to Col. Solomon Simpson, this 18th of April, 1800.

ABIEL JENNERS.

Mr. West, Sir, Please to pay the within to the bearer.

SOLOMON SIMPSON."

The defendant proved the signature to the said indorsement to be the hand-writing of the said Jenners.

The plaintiff then, in support of the issue on his part, produced a witness, who swore that the above note was passed by Abiel Jenners to him the deponent as the owner thereof, whether before or after it became due he does not recollect; but if before it became due, it was but a few days; that it was after it became due that he presented it to West, the defendant, for payment; that he held said note from five to ten days before he presented it to West.

The plaintiff then prayed the Court to direct the jury, that if they were of opinion, from the evidence offered, that the above mentioned promissory note was in the hands of the said Abiel Jenners, as the owner thereof, at or after the time when the attachment in this cause was laid in the hands of West, the garnishee, that then the attachment was a lien, and bound whatever money was due on the note from West, in the hands of West. But the County Court, [GANTT, Ch. J. and CONTEE, A. J.] were divided in opinion, and the direction as prayed was not given, wherefore the plaintiff excepted; and verdict and judgment being for the defendant, the plaintiff appealed to this Court.

The General Court reversed the judgment of the County Court, and awarded a *procedendo*.

Morsell, for appellant.

Ducket, for appellee.

Cases cited—*Welsh vs. Elliott*, and the cases there cited, viz. 1 *Salk*. 291, 280; *Skin*. 639; 1 *Ld. Ray*. 727.

## GENERAL COURT, OCTOBER TERM, 1804.

COWARD *vs.* BOHUN.

Though the practice of a Court is not to require bail in an action on a bond with a collateral condition, yet if there be no rule of Court to that effect, the defendant may be held to bail, if the plaintiff makes an affidavit for that purpose.

DEBT upon an appeal bond, and an affidavit to hold to bail.

*M<sup>r</sup> Mechen*, moved the Court to permit him to appear for the defendant, without bail.

CHASE, Ch. J. There is no rule of this Court that the defendant may appear without bail in an action on a bond with a collateral condition; the practice is so. But here is an affidavit. Bail must be given.

## COURT OF APPEALS, NOV. TERM, 1804.

WEST *vs.* JARRETT.

The decisions of the Chancellor as Judge of the land office, are not conclusive, but may be reviewed in the Court of Chancery by original bill. (a)

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint.

The bill stated, that one Robert Mooberry was possessed, by virtue of a license from the agents of the Lord Proprietary, and a certificate of survey on the same, of a parcel of land lying within the the reserves of Harford County, containing 300 acres; and that being so possessed, after the Act for confiscating British property, and appointing commissioners to take care of and dispose of the same, a certain Mordecai Amos was appointed by the said commissioners to value and appraise to the settlers thereon, that part of the said reserve, in which the land of the said Mooberry had  
**539** \* been located. That 300 acres of said land was appraised by Amos to one John Welsh, acting for Mooberry, who was absent at the time of the appraisement. That these reserves were afterwards directed to be sold to the settlers under the direction of the intendant of the revenue of the State. That the intendant gave notice, &c. and attended. That the defendant and Mooberry claimed the land, and that the intendant appointed disinterested persons to hear

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(a) Affirmed in *Goodsell vs. Lawson*, 42 Md. 370. .

the allegations of the parties, to ascertain to whom the right of pre-emption in their opinion belonged, and to report a state of facts to him. That the persons so appointed, after hearing the allegations, &c. adjudged that the land, (for which Mooberry afterwards returned a certificate to the land office called Norfolk,) did of right belong to Mooberry. That the only contention at that time between said Jarrett and Mooberry was, whether a tract of land patented to Jarrett's father, and called Buchanan's Deer Park, included the land possessed by Mooberry, and which he held under a certificate right; and it was then determined, "that Jarrett should hold all the land included within the lines of the said patent, and that Mooberry should hold all such land as was included within his certificate, and which was not within the lines of the said Jarrett's patent." Which decision was then assented to and confirmed by the intendant, and Mooberry then became the purchaser of 300 acres of land more or less, and gave bond, with security, for the same, at the price then agreed on, and obtained a certificate of his purchase from the intendant. That Jarrett at the same time purchased his lands called The Hills of Poverty, containing 1,500 acres, which he did not even intimate covered any part of the land claimed and purchased by Mooberry; because he well knew that the possessory right by which he claimed The Hills of Poverty, was of a later date than the possessory right by which Mooberry claimed his land; that is, the certificate of survey made on The Hills of Poverty, under the authority of the Proprietary agents, was of a subsequent date by several years to that made, by \* the same authority, for Mooberry. That Jarrett notwithstanding, returned a survey on his certificate **540** of The Hills of Poverty, and called the land so surveyed, Contestable Manor, which survey included Mooberry's said land called Norfolk. That Mooberry entered a caveat to this certificate of survey called Contestable Manor. That being a poor man, he could not pay, but was sued for the purchase money due the State, and the complainant became his special bail. That Mooberry removed to Pennsylvania, and the complainant, having paid the State, obtained an assignment from Mooberry of his said certificate. That on the trial of the caveat before the Judge of the land office, owing to want of information of the complainant relative to the transactions, and owing to the misrepresentations of Jarrett, the caveat was overruled by the Chancellor as Judge of the land office.

The bill concluded with a prayer for a decree to preclude Jarrett from obtaining a patent upon his certificate of Contestable Manor, until he excludes the land purchased by Mooberry and called Norfolk.

The answer contained a general denial of all the material facts alleged in the bill.

A variety of proof taken in the cause was exhibited, as also that which had been taken on the trial of the caveat.

HANSON, C. (June Term, 1801,) A very important point has been made by the defendant's counsel, viz. "That the cause has in effect been already decided by a tribunal competent to decide fully on law and equity, and therefore this Court, having no authority to examine the merits of that decision by way of appeal, and being applied to by an original suit, ought to consider itself as concluded by that decision."

The Chancellor considers himself under no necessity to decide, and therefore does not decide on that point. He is of opinion, that although the complainant had probable grounds for instituting his suit, he has not shown himself fully entitled to the relief prayed.

**541** He has not, in short, satisfied the Chancellor \* that he had an equitable claim to the land comprehended in the defendant's patent of Contestable Manor, and that when the defendant obtained his patent, he was apprised of the said equitable claim. Decreed, that the bill be dismissed without costs. From which decree the complainant appealed to this Court.

*Key and Shaaff*, for the appellant. The Chancellor as Judge of the land office refused West a patent. He filed his bill in the Court of Chancery, and the Chancellor decreed against him. The reserves of the Proprietary was leased out on long leases. After the Revolution the property belonging to the Lord Proprietary was confiscated to the State. By the Act of April, 1782, ch. 59, settlers were to have a preference and pre-emption allowed them of the reserve lands upon which they had settled. Jarrett claimed under a patent for Buchanan's Deer Park, which did not interfere with Mooberry's land. West claims under Mooberry. The Chancellor as Judge of the land office was not satisfied that West had an equitable claim, and that Jarrett had notice of West's claim.

The question is, whether or not the determination of the Chancellor, as Judge of the land office, is conclusive, and whether or not this Court is competent to revise the decision of the Chancellor as Judge of the land office?

The Act of November, 1781, ch. 20, opens the land office, and vests powers in the Chancellor as Judge of that office. The determination of the Chancellor is not conclusive. 1 *Burr.* 1005; *Evans' Essays*, 62. The Act of 1785, ch. 56, gives the Chancellor a summary jurisdiction. A decree obtained by fraud may be set aside on an original bill—*Com. Dig.* 109; *Ep. Ab.* 19.

*Martin*, (Attorney-General) and *Johnson*, for the appellee, cited *Powell*, 221, and the Acts of 1785, ch. 68, s. 8, and 1789, ch. 25, s. 4.

**542** \* The Court of Appeals, [RUMSEY, Ch. J. JONES and DENNIS, Judges,] reversed the decree of the Court of Chancery, and decreed that the appellee, by a good deed of bargain and sale duly executed, &c. convey to the appellant, and his heirs and

assigns, all that tract of land called Norfolk, lying in the reserves of Harford County, the certificate of which was made out for Robert Mooberry, by him assigned to the appellant, and is now in the land office, and all the estate, &c. of the said appellee, to any land included within the lines of the said certificate called Norfolk, and not included in an elder grant called Buchanan's Deer Park; and that the appellant have, hold and enjoy, all the land within the lines of the said certificate called Norfolk, to him and his heirs, except, &c. free and clear of the said appellee and his heirs, &c. and that the Chancellor pass such order, &c.

### COURT OF APPEALS, NOV. TERM, 1804.

#### HILLEARY vs. CROW.

The Court of Chancery has full power to decide all questions of law and fact which arise in that Court.

The practice of referring such questions to a Court of law and a jury, originated in the superiority of the trial by jury, but can be dispensed with in the discretion of the Court of Chancery. (a)

Where the matter in dispute is small, such reference should not be made, but everything should be decided by the Court of Chancery in the first instance.

Where the defendant has agreed to convey to the complainant a tract of land, and to give him possession on a certain day, and takes the complainant's bond for the purchase money, and he afterwards sues on the bond, and gets a judgment, the Court of Chancery will enjoin such judgment and compel him to make allowance to the complainant for the value of such part of the land as he may fail to give possession of at the time agreed on, from such time until possession be in fact given.

APPEAL from a decree of the Court of Chancery. The bill states, that the present appellant, being seised in fee of a tract of land called Peace and Plenty, containing 289 acres, did on the 28th of May, 1781, sell the same to the complainant, (Crow,) for 40,000 wt. of merchantable crop tobacco, and on that day executed a bond of conveyance, and the complainant passed his bond to the defendant for the purchase money. That the whole of the land was to have been delivered up on the 20th November then next. That one Burton was in possession of a part, holding the same under an agreement with Hilleary; and that possession of that part of the said tract was not delivered to Crow on the day so agreed on, nor was it delivered until November, 1793, although frequently \* demanded, &c. That the annual value of that part not delivered **543** was worth 750 lbs. of crop tobacco, no part of which Crow received, but that the same was paid to Hilleary. That there has never been

(a) See *Barth vs. Rosenfeld*, 36 Md. 604.

any conveyance of the land to Crow. That the whole purchase money has been paid except 5,196 lbs. of crop tobacco. That he had hoped that in a Court of law he might have had a deduction for the value of that part of the said land held by Burton, for the time that he Crow, was deprived of the possession of it. But that on a suit brought on the bond given for the purchase money, Crow was advised that the same was no legal defence. That judgment was obtained on the bond in the General Court at May Term, 1794, for the penalty and costs, to be released on payment of 5,196 lbs. tobacco, with interest and costs; which quantity of tobacco was the balance due, deducting the sums of money actually paid, without making any allowance for the use of the land so in the tenure of the said Burton. The bill prayed a conveyance and injunction, &c.

The answer admitted that Burton held about 10 acres, not worth 50 lbs. of tobacco per annum, and that he the defendant never received any rent for the same. That it was the complainant's fault if he did not get possession of the 10 acres, or receive the rent. That he believes that Crow did receive some personal services from Burton. That possession was never demanded by Crow. That suit was brought on the bond, and every possible defence in pleading, and otherways, was made by Crow, but that a verdict and judgment was given for Hilleary. Testimony was taken under commissions.

HANSON, C. (10th March, 1802.) As the value of the subject of contest in this cause is inconsiderable, and as doubts may be entertained concerning the proper method of ascertaining that value, it is proposed that the solicitors agree that the auditor of this Court shall, from the evidence in this cause, state an account between the parties, in which he \* shall make such charges against the  
**544** defendant as he may think the complainant entitled to on account of Burton's land being withheld from him, and that the said account, when returned to this Court, shall be subject to exceptions, and be done with as the Chancellor shall think fit. The object is to dispense with the issue of *quantum damnificatus*, which perhaps might be considered as the proper measure, instead of a reference to the auditor.

HANSON, (May 4, 1801.) The solicitors of the parties having declined the agreement proposed by the Chancellor, it is incumbent upon him to decide according to the best of his judgment.

He has never entertained a doubt of the power of this Court to decide all points of law, and all questions of fact which arise in this Court; although it has always been the practice to refer important questions of law and fact to the decision of a Court of law and a jury. He conceives that the practice originated merely from a sense of propriety. Inasmuch as a point of law, if decided by this Court, might afterwards come before a Court of law, it appeared proper to

refer it to the Court of law in the first instance; and inasmuch as the trial by jury is justly considered as far superior to a trial by any one person whatever on written depositions, it has always appeared proper, and has therefore been the practice, to direct issues in important questions of fact.

In the present case it is merely on account of the low value of the subject of inquiry that the Chancellor chooses to make a reference to the auditor instead of directing an issue of *quantum damnificatus*, &c. he declares this, lest a precedent for cases of importance may hereafter be supposed to have been given.

It is ordered that auditor of this Court state an account, &c.

Such an account was accordingly stated, and the auditor reported that there was due from Hilleary to Crow the sum 160*l.* 4*s.* 0*d.* current money, for the value of that part of the land withheld, &c.

\* HANSON, C. (September 10, 1801,) having confirmed the report of the auditor, &c. decreed, that the defendant should convey, &c. to the complainant, the said land by good deed, &c. That the defendant should be perpetually enjoined from all further proceedings on the judgment at law; and that he should pay to the complainant the sum of 26*l.* 18*s.* 8*d.* current money, with interest from the 7th of August, 1801, and costs. From this decree the defendant appealed to this Court. 545

*Key* and *Johnson*, for the appellant.

*Shaaff*, for the appellee.

The Court of Appeals affirmed the decree of the Court of Chancery without costs.

## GENERAL COURT, (E. S.) APRIL TERM, 1805.

### GIBSON *vs.* MARTIN.

The possession of a part of a tract of land, with title to the whole, is the possession of the whole, except against an adverse possession by actual enclosure. (a)

TRESPASS *q. c. f.* upon a tract of land called Rattle Snake Point, lying in Talbot County.

In this case it was proved that the plaintiff had title to the tract of land upon which the trespass complained of was committed, and had also possession thereof.

The defendant claimed under a younger tract, which run in upon the plaintiff's land, and upon which the trespass was committed, and that he had possession thereof for upwards of fifty years.

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(a) See *Davidson vs. Beatty*, 3 H. & McH. 315, note.

THE COURT said, that the possession of the plaintiff of a part of the tract called Rattle Snake Point, with the title, was a good title and possession of the whole of the tract, unless the defendant proved actual possession by enclosure, of the tract which he claims, for upwards of twenty years.

*J. Bayly, John Scott and Earle*, for the plaintiff.

*Martin*, (Attorney-General,) *Hammond* and *Bullitt*, for the defendant.

## 546 \* GENERAL COURT, (E. S.) APRIL TERM, 1805.

### DAVIDSON vs. CLAYLAND, Garnishee of BLAKE.

Under the Act of March, 1778, ch. 9, s. 6, as soon as a suit is commenced by the State, a lien is created on the lands of the debtor, and the State acquires a right of preference over the other creditors who had not, prior to the commencement of the suit by the State, secured a lien by judgment, mortgage, or otherwise. (a)

If such lands be sold by a sheriff under a *fiery facias*, issued on a prior judgment and lien, the surplus of the money arising from the sale after satisfying such prior lien, remaining in the hands of the sheriff, is to be considered as land and subject to an attachment issued by the State on its judgment, in preference to a prior attachment issued by a private creditor on a judgment rendered at the same term.

The title and preamble of an Act of Assembly are never resorted to in expounding it, to ascertain the meaning of the Legislature, where the words in the enacting clause are explicit. (b)

ATTACHMENT on a judgment rendered in this Court. It appears by the pleadings in this case, that the State of Maryland commenced suits in this Court on two bonds against Blake, (being bonds by him executed for the performance of the duties of sheriff;) the first on the 19th of July, 1797, and the second on the 2d of July, 1798. In the first action judgment was obtained on the second Tuesday of September, 1799, and in the second action judgment was obtained on the second Tuesday of September, 1800. On the first judgment the State sued out a writ of *fiery facias* on the 22d of August, 1800, which was directed to Clayland, the defendant, then sheriff of Queen Anne's County, and was levied by him on the land of Blake, which land was sold under a *renditioni exponas*, issued on the 23d of September, 1800, for a sum of money sufficient to satisfy the said judgment, with the costs, and leaving a surplus of £80, which was paid to the defendant, and still remains in his hands, and

(a) See Rev. Code, Art. 64, s. 30; *State vs. Rogers*, 2 H. & McH. 125. note, as to the State's priority as a creditor.

(b) See *Laidler vs. Young*, 2 H. & J. 69; *Hays vs. Richardson*, 1 G. & J. 366; *Canal Co. vs. R. R. Co.* 4 G. & J. 1.



was attached by the State on the 23d of July, 1801, in virtue of an attachment issued the 1st of May, 1801, on the second judgment. S. T. Wright having the bond of Blake, assigned the same to Mrs. Davidson, the plaintiff in this case, who commenced suit thereon for the use of Wright, and obtained judgment at September Term, 1800, and sued out the present attachment on the 25th of April, 1801, which was laid in the hands of the defendant on the 4th of May, 1801. The defendant demurred to the plaintiff's replication, to which there was a joinder.

*Martin*, (Attorney-General,) and *Wright*, for the defendant. 1. The State has a preference, in the payment of debts due to it, from the date of the writ, and it is for the public advantage that the State should have such a preference. Act of March, 1778, ch. 9, s. 6.

\* 2. The State has a right to the preference at common law, on the ground of prerogative. See 2 *Harr. & McHen.* 198; 3 *Harr. & McHen.* 171. **547**

*Spencer* and *Scott*, for the plaintiff. Money in this case is not to be considered as land. The surplus money in the hands of the sheriff is not to be considered as land, but remains subject to the order of the debtor. *Dougl.* 231; 4 *East*, 510. If the sheriff had paid over the money to the plaintiff, he would not have been liable. 1 *T. R.* 729.

CHASE, Ch. J. The question to be decided by the Court is, whether the State is entitled to a preference?

The Court are of opinion, that the Act of March, 1778, ch. 9, fully embraces this case.

The sixth section of that Act renders all lands and tenements, belonging to any public debtor of the State, liable to execution from the commencement of the suit of the State, in whatever hands or possession they may be found. The words of this clause are plain and comprehensive, including within it every debtor to the \* State without distinction, and without regard to the manner in **550** which he became indebted.

The title and preamble of an Act of Assembly are never resorted to in expounding it to ascertain the meaning of the Legislature, except where the words in the enacting clause are doubtful, or not sufficiently explicit to express their intention.

This clause contains a particular and positive provision, which is not controlled or in any manner affected by any other part of the Act.

As soon as the suit was commenced by the State a lien was created on the lands of the debtor, Philemon C. Blake, and the State acquired a right of preference over the other creditors of the said Blake, who had not, prior to the commencement of the said

suit by the State, secured a lien by judgment, mortgage, or otherwise, on the lands of the said Blake.

The priority of payment, thus acquired by the State, could not be divested or defeated by any Act of the sheriff who sold the land, the debtor, or any other person—And the surplus of the money arising from the sale of the said Blake's land, after satisfying the first judgment of the State, remaining in the hands of the defendant, is to be considered as land, and subject to the attachment of the State, issued on the second judgment in preference to the claim of the plaintiff.

*Demurrer ruled good.*

### GENERAL COURT, MAY TERM, 1805.

LOWE *et ux.* vs. MACCUBBIN *et al.*

There is no distinction, under the Act of 1786, ch. 45, to direct descents, between brothers and sisters, (children of the same father,) of the whole and half blood, where the estate descended from the father.

THIS was a case sent from the Court of Chancery for the opinion of this Court, viz.

In Chancery, June 15, 1805. It is admitted by the parties that Joseph Maccubbin died intestate some time in the year 1800, seised of sundry tracts of lands situate in Anne Arundel County. It is also admitted, that he left the following children, to wit: The wife  
**551** \* of Lloyd M. Lowe, (complainant,) by one wife, and Nicholas and Charlotte Maccubbin, (the defendants,) by a second wife, and at the time of the death, of the said Joseph Maccubbin, his second wife was with child, since born and now alive, named Nicholas, the said first named Nicholas having died previous to his birth, a minor, and without issue.

At the instance of the complainants, the Chancellor takes the liberty of requesting the honorable the Judges of the General Court to give their opinion, whether or not the complainant's wife, together with the said Charlotte and Nicholas Maccubbin, (the 2d,) are equally entitled to the portion of the land which descended to the said Nicholas, (the first,) from his father; or whether or not the same devolved on the said Nicholas and Charlotte of the whole blood, to the exclusion of the complainant's wife, a sister of the half blood?

A. C. HANSON, Chancellor.

The General Court sent the following certificate to the Court of Chancery:

To the honorable the Chancellor of Maryland,

We, the underwritten, Judges of the General Court, do certify, that in our opinion the complainant's wife, together with Charlotte

and Nicholas Maccubbin, (the second,) are equally entitled to the portion of the land which descended to the said Nicholas, (the first,) from his father.

J. T. CHASE,  
R. SPRIGG.

GENERAL COURT, MAY TERM, 1805.

BROSIUS vs. REUTER *et al.*

In a return to a *mandamus*, the same certainty is required as in declarations and pleadings, nothing can be supplied by intendment or inference.

The facts stated in a return to a *mandamus*, are supposed to be true and are not traversable. (a)

If they are false, the remedy is by action against the person making the return.

The return to a *mandamus* held to be insufficient, in not showing and setting forth with precision and certainty the rules, laws and canons, of the church, &c.

MANDAMUS to restore, or caused to be restored, the prosecutor into the place and function of minister of "The Saint John's German Catholic Church of \* Baltimore," in the City of Baltimore, and to the use of the pulpit and altar of the said church, and of the parsonage house thereof, and of all and singular the effects, property, rights, privileges, liberties and functions, to the said church, altar and pulpit, and to the office and duty of rector or priest of the said congregation, in any wise belonging or appertaining, or to signify to the Court here cause to the contrary thereof, &c. 552

Proof was made of a service of the *mandamus* on each of the defendants.

The defendants made the following return, to wit: We, Cæsarius Reuter, &c. &c. the parties to whom the writ hereto annexed is directed, by virtue of the writ aforesaid, do most humbly certify to the Judges of the General Court, sitting in the General Court for the Western Shore of Maryland, that the persons named in the said writ are members of a congregation of Christians, associated together for the purpose of divine worship in the City of Baltimore, and Baltimore County, and are denominated "The Saint John's German Catholic Church of Baltimore." We do further certify, that the said Cæsarius Reuter was duly elected and chosen, by a majority

(a) Under Rev. Code, Art. 67, sec. II, s. 5, *et seq.* the petitioner may plead to or traverse the averment of the answer to a *mandamus*, and the defendant shall take issue or demur to the plea or traverse; and such further proceedings shall thereupon be had as if the petitioner had brought an action on the case for a false return. See *Motter vs. Primrose*, 28 Md. 501; *Runkel vs. Wine-miller*, 4 H. & McH. 276, note; *Harwood vs. Marshall*, 10 Md. 451.

of the members of the said Congregation, minister thereof, and that he still continues to exercise his ministerial functions with the approbation and consent of the said majority. And we do further certify, that the said Cæsarius Reuter was put into possession of the church of the said congregation, and of the use of the pulpit thereof, as minister of the said congregation, with all the liberties, privileges and advantages, to that place and function belonging and appertaining, and that the said minister, so elected and put into possession, holds the place and function of minister of said congregation, by the will and assent of a majority of the members of the said congregation. And we do further certify, that the said Francis X. Brosius has been appointed minister by the Right Reverend John Carroll, Bishop of Baltimore, without the previous consent and

**553** approbation of the majority of the members of \* the said congregation, and in opposition to their declared wishes and choice, and contrary to the rules, laws and canons of the Catholic Church. And we do further certify, that by the fundamental laws, usages and canons, of the German Catholic Church aforesaid, to which we belong, that the members of the church, who found and built and contribute to the support of the church and the pastor thereof, have the sole and exclusive right of nominating and appointing their pastor, and that no other person, whether bishop or pope, has a right to appoint a pastor without the assent and approbation of the congregation, or a majority of the same. And we do further certify, that the said Cæsarius Reuter is a regular clergyman belonging to the society called "The Minorits Conventuals of the Order of Saint Francis," and that the said Cæsarius Reuter was sent back to the United States to found a German Catholic Church in Baltimore, according to the law of the said United States; and that in virtue of the said authority, he the said Cæsarius Reuter, and a majority of the congregation aforesaid, did build, found, and erect the said church, called "The Saint John's German Catholic Church of Baltimore," and did place the said church under the sole and exclusive control of the said order according to the law of the United States; of which said church the said Cæsarius Reuter was put and appointed pastor, and still continues so to be; and that by the canonical law of the Catholic Church aforesaid, the said Cæsarius Reuter, owes obedience to the magistrate, and to said order, and to no other ecclesiastical person or body whatsoever. And therefore we cannot, nor can either of us, restore the said Francis X. Brosius into the said place and function of minister of the said church, called "The Saint John's German Catholic Church of Baltimore," and to the use of the church of the said congregation, and the pulpit thereof, as minister of the said congregation, with all liberties, privileges and advantages, to that place and function belonging, as by the writ

**554** aforesaid we are commanded. In witness whereof we hereto \* set our hands and seals the 13th day of May, in the year of our Lord 1805.

FRID. CÆSAR. REUTER, [(L. S.)]

And also signed and sealed by the other defendants.

*Harper*, for the prosecutor, moved the Court to quash the return for insufficiency, for the following reasons:

1. The return states that they belong to "The Saint John's German Catholic Church of Baltimore," (which is a congregation professing the Catholic religion,) and then states, that by the canons, &c. of that congregation, a majority may appoint, but does not shew that in the Roman Catholic Religion, a particular congregation can have separate canons.

This being material, must be positively shewn, and cannot be made out by inference or intendment.

2. It states, that the bishop appointed the prosecutor, "contrary to the rules, laws and canons of the Catholic Church," without shewing in what respect the appointment was contrary to those rules, laws and canons, or what those rules, laws and canons are.

3. It states, that the said Cæsarius Reuter was elected and put into possession by a majority, without shewing when and where the said election took place, and how many members of the congregation there were at the time of the said election, and how many voted for the said Reuter; and that the meeting for the purpose of such election was held pursuant to the canons.

4. It states, that by the canons, laws and usages, of the German Catholic Church aforesaid, the members who found and build a church, and who contribute to the support of it, and of the minister, have the sole and exclusive right of nominating and appointing their pastor; but does not shew particularly what those canons, laws and usages are, nor how they were established.

5. It states, that the said Reuter, and a majority of the congregation, did erect the said church, and did place it under the direction of the society or order called "The Minorits Conventuals of the Order of Saint \* Francis," without shewing when and by what persons particularly, and in what manner the said acts were 555 done; and how many members there were of the said congregation at the times of doing those acts respectively, and the particular canon or laws by virtue of which the said acts are respectively supposed to have been done.

6. It states, that the said church was built and founded by authority from the aforesaid order or society, without shewing the nature and extent of that authority, or the manner in which it was given, or the power of the said order or society to give such authority.

7. It states, that by the canonical law of the Catholic Church, the said Reuter owes obedience to the said order, and to no other ecclesiastical person or body whatsoever, without shewing particularly what that canonical law is.

8. It states, that the persons named in the return are members of "The Saint John's German Catholic Church of Baltimore," and that

they, with a majority of the members, did certain acts, without shewing how they respectively became members, or what number of persons joined with them in doing the said acts, and how those persons became members.

9. It claims an absolute exemption from ecclesiastical discipline and authority, which is inconsistent with the known rules and constitution of the Roman Catholic Religion, and is not warranted by the laws or Constitution of this State or of the United States.

10. It does not shew that the prosecutor was removed.

It is a general principle, he said, that every return to a mandamus to be good must be a complete answer to the writ. *The King vs. The Mayor of Abingdon*, Salk. 433; S. C. 1 Ld. Raym. 559.

**556** \* For the certainty required in pleading, and in the returns to writs of mandamus, he cited 5 Com. Dig. 7, 32, 33, 48; 4 Com. Dig. 215; Burr. 731; 3 Salk. 430, 433, 436; 1 Show. 282; 6 Mod. 309; 1 Stra. 64; 2 Ld. Raym. 1566; 5 Mod. 258, 259. In the case of *Runkel vs. Winemiller*, 4 Harr. & McHen. 429, a very special return was made. But this Court said such matter must be set forth to shew the appointment was by a majority. The Court in that case held all the objections to the return to be fatal, and particularly that which is the subject-matter of the 9th objection to the present return.

**557** \* *Hollingsworth and Kell*, on the same side. *Martin*, (Attorney-General,) *Purviance* and *Boyd*, for the defendants.

CHASE, Ch. J. (DONE, J. absent. SPRIGG, J. concurred.) In the return to a mandamus the facts, which are requisite to justify a refusal to restore, must be stated with precision and certainty. A defective and incomplete statement of facts cannot be aided or supplied by intendment or inference. All the authorities support the position, that the same certainty is required in a return to a mandamus as is necessary in declarations and pleadings. The facts exhibited in the return must appear to the Court to be a complete justification for refusing to restore, or the Court will order a peremptory mandamus; and certainly there cannot be any thing better established than that necessary facts not stated are not inferable or to be intended from facts which are set forth. The facts set forth in the return are supposed to be true, and are not traversable; and the Court must decide, whether they are a sufficient and legal cause to justify the refusal to restore. Should the statement of facts in the return be false, the remedy is by action against the persons who make the return, and to whom the mandamus was directed.

These principles being recognized will lead the Court to a right decision in this case.

The Court are of opinion, that the return of *Cæsarius Reuter*, &c. &c. to the writ of mandamus in this case, is insufficient and defec-

tive in law, in not shewing and setting forth, with precision and certainty, the rules, laws and canons, of the Catholic Church, which render the appointment of Francis X. Brosius, minister of "The Saint John's German Catholic Church \* of Baltimore," by the Right Reverend John Carroll, Bishop of Baltimore, unlawful, without the previous approbation of the majority of the members of the congregation of the said church. 558

In not setting forth the fundamental laws, usages and canons, of the said German Catholic Church, which vest the right and power of nominating and appointing the pastor of the said church exclusively in the members thereof who did found and build the same, and do contribute to the support of the said church and pastor thereof.

In not setting forth the rules and canons of the said church which make the assent and approbation of the congregation of the said church, or a majority of them, necessary to validate the appointment of the pastor by the said bishop.

In not setting forth any rules or canons of the said Catholic Church, whereby "The Saint John's German Catholic Church of Baltimore" is placed under the superintendence and control of the society called "The Minorits Conventuals of the Order of Saint Francis," in exclusion or derogation of the authority of the Pope, and of the said John Carroll, Bishop of Baltimore.

And thereupon the Court quash the said return, and order a peremptory mandamus to issue to the Reverend Cæsarius Reuter, &c. &c. to restore, &c.

*Return quashed, &c.*

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## GENERAL COURT, MAY TERM, 1805.

### HOWARD *vs.* THE LEVY COURT, &c.

Cause shown by the Justices of the Levy Court, why a *mandamus* should not issue against them to levy money, &c.

The defendant, and not the plaintiff, is answerable for the poundage fees on executions. (a)

If property is taken under a *fi. fa.* and the plaintiff and defendant compromise, the sheriff may sell to the amount of his poundage fees.

Where there are several executions against several defendants for the same debt, the sheriff is entitled to poundage fees only on the sum really due.

Where executions go to different counties on either a joint judgment or on several judgments for the same debt, the sheriffs of such counties must divide amongst them the poundage fee on the real debt.

MOTION by the plaintiff for a rule on the Justices of the Levy Court of Anne Arundel County, to shew cause why a writ of *manda-*

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(a) See *Fisher vs. Beatty*, 3 H. & McH. 100, note.

mus should not issue to them, and each and every of them, as justices as \* aforesaid, commanding them to allow and levy  
**559** upon the assessable property of the said county, and cause to be collected and paid to the plaintiff, a sum of money due to him as poundage and other fees, in executing, as sheriff of the said county, sundry writs of *capias ad satisfaciendum* issued out of the General Court at the instance and for the use of the Justices of the Levy Court aforesaid, against sundry persons, as particularly mentioned in the affidavit produced and filed. The affidavit stated, that the plaintiff was duly elected and commissioned sheriff of Anne Arundel County for the years 1801, 1802 and 1803, and gave bonds, with security, and took the several oaths required by law, and served as sheriff of the said county during the said years. That during his continuance in his said office as sheriff, to wit, on the 25th of August, 1801, four writs of *capias ad satisfaciendum* issued out of the General Court, on four separate judgments, rendered in that Court, in favor of the justices aforesaid, and were directed and delivered to him as sheriff of the county aforesaid, that is to say, &c. which writs were severally endorsed to be released on payment of £1,800 current money, with interest thereon from the 14th of June, 1797, till paid, and 757 wt. tobacco, costs, and that any payments which had been made appear to J. M. before the 20th of August, 1801, were to be allowed. That these executions were served on each of the defendants, and so returned to the General Court at October Term, 1801, and were entered not called by consent. That the plaintiff's poundage and other fees for serving said executions, amounted to 280l. 18s. 4d. current money. The affidavit further stated, that four other similar executions issued at the same time, in the same manner, and at the instance and for the use of the said Levy Court, against certain other persons, each endorsed to be released on payment of £920 current money, with interest from the 22d of June, 1797, till paid, and 757 wt. of tobacco, costs, with a similar direction as to the payments to be allowed; which last executions were served on each  
**560** of the defendants and so \* returned to October Term, 1801, and were in like manner entered not called by consent. That the poundage and other fees due the plaintiff on these last writs, amounted to 135l. 3s. 4d. current money. That he applied to the Levy Court to levy the amount of his account for fees as aforesaid, amounting in the whole to the sum of 412l. 1s. 8d. current money, and that they refused to levy more than the sum of 25l. 12s. 7½d. alleging that the whole of the money, as endorsed on the said several executions, was not due from the defendants; and that the four first mentioned executions all issued for one and the same sums of money, except costs; and that the four other executions issued for one the same sum of money, except costs. That the balance due him, not levied, amounts to 386l. 9s. 0½d. current money, as per account exhibited and filed.



Notice of the intended motion was served on each of the said justices, and the rule laid to shew cause by a particular day during the term.

*Shaaff* appeared on the part of the Levy Court, and filed the following answer, to wit:

The Levy Court of Anne Arundel County do hereby certify and state to the honorable the Judges of the General Court, in answer to the application of Henry Howard for a writ of *mandamus* to be directed to the Justices of the said Levy Court:—

That we believe that four writs of *capias ad satisfaciendum* issued, as the said Howard hath stated in the affidavit on which he grounds his said application, but for greater certainty we refer to the writs themselves; that although the said writs are endorsed as they appear, yet they were only for the payment of one sum of money, and the costs of each separate judgment; and it appears from the records of our Court, that there was not more due than the sum, for which poundage fees hath been allowed. We also state, that we believe that the other writs of *capias ad satisfaciendum* issued as stated in the affidavit upon which the said application is grounded, but for greater certainty we refer to writs themselves; and that although the said writs are endorsed, as they \* purport to be, yet it appears from our records that there was not more due than **561** the sum for which poundage fees hath been allowed. That the aforesaid Howard, in January last, presented the account which is herewith produced, claiming to be paid his poundage fees upon each several execution upon the several sums for which the said executions were respectively endorsed. But the Levy Court, upon full deliberation, did not think that they could, consistently with their duty, levy for the said Howard more for his poundage fees than what would be due him, calculating the said fees upon the sum due and receivable upon the whole of the said executions; and that the Levy Court did, at the time of laying the levy, direct to be levied for him his poundage fees aforesaid, calculating them according to that principle, which the Court then thought and still think correct. We further state, that the levy hath been already laid, and a collector appointed to collect the same for the present year, and that no further levy is intended to be made during the period for which by law our present commission as Justices of the Levy Court will continue, nor will the collector already appointed by us be accountable under his bond already given for any future levy which may be laid. We therefore submit to this honorable Court, whether it would be proper to direct a *mandamus* to the present members of the Levy Court, to levy a sum of money for the said Howard, when the next levy for the said County will be laid at a time when the Levy Court will be acting under a new commission, and more especially as this claim for poundage fees, if it ever had any foundation, should not

have laid dormant until the last levy for our said county. We further beg liberty, with all proper respect, to certify to your honorable body, that we conceive, by the laws of this State, the power and the right to lay the levies on the people of the several counties, are exclusively vested in the respective Levy Courts, the members of which are alone responsible to the government and the public for their conduct; and that on this occasion, having acted deliberately on the question, and \* being of opinion that we could not  
**562** with propriety tax the people of Anne Arundel County with this claim of the said Howard, we trust and hope that it will not be considered within the power of the judiciary to grant the writ of *mandamus* applied for.

Signed by order,

N. H. Clk. L. C. A. A. Cty.

*Shaafl.* Several objections arise as to the plaintiff's right.

1. The sheriff is only entitled to claim poundage fees on one debt where several executions issue for the same debt.

2. The Levy Court are annually appointed, and the defendants may not be in commission when the next levy is to be laid. The laying of levies is exclusively vested in the Justices of the Levy Court, and they are not subject to the control of the judiciary. The Justices of the Levy Court are appointed under the Act of 1794, ch. 53. If the judiciary has the right to control the Levy Court, they may incidentally lay the levy.

3. The Levy Court have already discharged their duty in laying the levy for the present year, and have appointed a collector, and taken his bond. The case of *Ellicott et al. vs. The Levy Court, &c. ante* 359, is different from the present case; in that case there was a law directing them to levy the money.

4. The Justices of the Levy Court do not act in a ministerial, but in a judicial capacity; and a writ of *mandamus* never issues to Judges acting judicially. *The United States vs. Lawrence*, 3 *Dall. Rep.* 42; *Quynn vs. State*, *ante* 36; 5 *T. R.* 470.

\* CHASE, Ch. J. The Court wish to hear counsel, whether  
**563** the sheriff has a right to charge poundage fees on each execution, where there are several executions for the same debt; and whether the plaintiff, and not the defendant, is answerable to the sheriff for the poundage fees?

*Ridgely*, for the motion. It has been decided in this Court, in the case of *Court vs. Reeder*, about the year 1791, that the plaintiff is answerable to the sheriff for the poundage fees on an execution. So also in 2 *T. R.* 132, 157. If an erroneous writ issues, the sheriff is to have his fees. *Salk.* 352. Suppose separate *ca. sa's* against three solvent and one insolvent person. If the solvent persons are brought into Court, and the other not, the sheriff is liable to an

action of escape. In the case of *Stewart vs. Dorsey's Executors*, 3 Harr. & McHen. 401, the defendant was bound by the promise made by her testator, to pay the fees, otherwise the plaintiff could not have recovered them from her.

\* Key, also for the motion, stated, that he had authorities to shew that this Court can direct the mandamus to the Levy Court; but as they have intimated that the other points should be first argued, he would proceed to examine them. 564

The poundage fees are no part of the costs. If the sheriff is not competent to detain the defendant, who then is to pay the poundage fees? Why surely the plaintiff. The defendant being in gaol, the question was, who was to pay the poundage fees? And it was decided that the plaintiff was. *Imp. Shff.* 145; he also cited *Salk.* 230; 2 T. R. 126.

CHASE, Ch. J. (DONE, J. absent. SPRIGG, J. concurred.) The Court think the question has been decided by this Court, that the defendant, and not the plaintiff, is liable for the sheriff's poundage fees on executions. If it were not so, the poundage fees would be considered as part of the costs.

\* The Assembly, by the Act of November Session, 1779, ch. 25, s. 4, intended to redress the evil practice of sheriffs in taking more poundage fees than they ought. That Act directs the sum to be endorsed, and the sheriff is not bound to execute the writ unless such endorsement is made. The Act shews that the defendants are liable to pay those fees, and there is no instance of the plaintiff's receiving the poundage fees from the defendant. 566

Upon a *feri facias*, if goods are taken, and the debt is compromised, the sheriff can sell to the amount of his poundage fees.

If the defendant has paid the debt and costs, the Court would not say the sheriff could detain him in execution for the poundage fees. But the sheriff may call on the defendant for the poundage fees, and compel payment in the same manner as he can for other fees.

Suppose a *ca. sa.* against several persons, and one of them pays the debt and costs, and poundage fees, and the sheriff was to say he would not discharge the other defendants until they also paid the poundage fees: what would the Court say? Why they would compel him to discharge the other defendants.

The Court are of opinion, that no more can be received by the sheriff but poundage fees upon the sum really and actually due to the plaintiff in the execution. That the sheriff is not entitled to but one poundage fee on executions against the principal and his securities, whether on a joint or separate judgment; and that the defendant, and not the plaintiff, is answerable for the poundage fees. That where executions issue to separate counties for the same

debt, against the principal and his securities, or several defendants, then the sheriffs ought to divide the poundage fees.

*Mandamus refused. (a)*

**567** \* GENERAL COURT, MAY TERM, 1805.

DYSON *vs.* WEST'S Ex'x.

The omission of the word security in the probate of an account under the Act of 1785, ch. 46, (Code, Art. 37, s. 43,) is fatal. (b)

Two several probates of the same account under that Act, taken at different times, cannot be considered together so as to make either complete, if in itself each be defective.

The above Act, so far as it relates to the proof of accounts, must be strictly construed. (c)

The plaintiff not having filed an account to meet a count in his declaration for matters properly chargeable in account, is not a sufficient ground for the Court to grant leave to amend the declaration.

ASSUMPSIT for goods, wares and merchandise, sold and delivered, &c. and for sundry matters properly chargeable in account.

The defendant pleaded *non-assumpsit* and *plene administravit*. There was the general replication to the last plea, and issues were joined. The plaintiff brought this action as surviving partner of Dyson, Rogers & Co. (foreign merchants,) against the defendant as executrix of Stephen West, surviving partner of John Hobson.

At the trial the plaintiff offered in evidence to the jury an account of the goods shipped by the house of Dyson, Rogers & Co. to West & Hobson, which was proved as follows, to wit: "London, to wit, Kingdom of Great Britain. On the 27th of November, 1799, personally appeared Abraham Dyson, of London, merchant, late partner with John Rogers and Ely Dyson of London, merchants, deceased, who carried on trade and merchandise under the firm of Dyson, Rogers & Co. before me the subscriber, Lord Mayor of the City of

(a) The following is an opinion given by the Attorney-General, (Luther Martin, Esq.) in October, 1804, upon some of the questions raised in this case, viz.

"Judgments are obtained by a plaintiff in separate actions on the same bond, or on the same debt against principal and sureties. *Fi. fa's* are taken out upon these judgments. Though each person is answerable for the whole debt, yet they are altogether only answerable for one amount. The sheriff cannot levy more than the whole debt upon any one or all. He is only at risk to the amount of the debt, and cannot therefore be entitled to claim more than poundage fees upon the actual debt. For these poundage fees each and all are answerable till paid, but the sheriff cannot claim full poundage fees on the debt against each, and compel each to pay them."

(b) See *Evans vs. Bonner*, 2 H. & McH. 248, note.

(c) Approved in *Warner vs. Fowler*, 8 Md. 30.

London aforesaid; and at the same time appeared J. W. of, &c. late clerk to the before mentioned partnership of D. R. & Co. and made oath on the Holy Evangely of Almighty God, that the several bills of parcels marked No. &c. hereunto annexed, are bills of parcels of sundry goods, wares and merchandise, sold by the said D. R. & Co. and were shipped and consigned to Messrs. Stephen West and John Hobson, then of, &c. on their partnership account and risk, and that the same are just and true as therein stated; and that the account current marked with letter B, hereunto annexed, entitled, &c. and signed by the said A. D. as surviving partner of the said J. R. and \* E. D. deceased, is a just and true account, and that they believe the goods, wares and merchandise, charged in the **568** said account, and the above bills of parcels, were *bona fide* delivered as charged, and that they, or either of them, have not, nor did the said J. R. & E. D. or either of them, to the best of these deponent's knowledge and belief, receive any payment or satisfaction for the articles charged, more than credit is duly given for in and appearing upon the said account, nor have they the said J. R. and E. D. or either of them, received any security for the same, and that the balance charged and claimed is justly due, according to the best of their respective knowledge and belief."

It was sworn before, signed and certified by, the Lord Mayor, and a certificate by a notary public that such person was lord mayor; and also a certificate of the American consul, that the person certifying as notary public was a notary public.

*Shaff*, for the defendant, objected that the probate to the account offered in evidence is not such as the Act of 1785, ch. 46, requires.

*Buchanan*, for the plaintiff. The account is substantially proved conformably to the Act of 1785, ch. 46, which does not prescribe a particular form.

\* CHASE, Ch. J. When were the old and new probates made? **571**

*Key*, for the defendant. The old probate appears to have been made in 1796, and the new one in 1799.

CHASE, Ch. J. Will not the question occur as to the security between 1796 and 1799?

*Johnson*, for the plaintiff. The Act of Assembly does not specify at what time the probate is to be made?

CHASE, Ch. J. The old probate cannot supply any defect which may be in the new probate, for although the plaintiff might have proved in 1796 that he had received no security, yet in 1799, when the new probate was made, if he had received security in the interval, he could not make the probate, and that word being omitted in

the last probate, it may be well presumed he had received such security in that interval.

The Court are not deciding how far the word security is essential. But they say, if it is an essential omission, the old probate cannot aid it.

The Court think the plaintiff's counsel had better consent to withdraw a juror, and continue the case, for the purpose of getting better proof.

But the counsel of the defendant would not consent that a juror should be withdrawn, and upon examination the Court discovered they had no authority to order a continuance without the consent of the defendant's counsel.

**572** CHASE, Ch. J. The Court consider that part of the Act of Assembly, (1785, ch. 46,) which requires that the party bringing the suit should swear that he had received no security, is an essential which cannot be dispensed with; and that the defect in the probate is in a matter of substance, and therefore fatal.

*Johnson*, for the plaintiff, prayed leave to amend the declaration, and that a juror might be withdrawn for that purpose. The declaration, he said, has a count for sundry matters, &c. and there was no account filed applicable to that count.

*Shaff*, *contra*. This would be getting round the Act of Assembly for the amendment of the law. There is in the declaration a count for goods, wares and merchandise.

CHASE, Ch. J. The Court are not authorized to give the leave. The Act of Assembly does not authorize the Court to give leave to amend upon the ground stated. *Plaintiff non-suited.*

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### GENERAL COURT, MAY TERM, 1805.

#### COLE'S Lessee vs. COLE.

If after a witness is sworn on the *voir dire*, it appears from his own testimony on his examination-in-chief, that he is interested, his testimony may be rejected.

But if his interest appears only from the evidence of the other witnesses, his testimony cannot be rejected.

If the defendant in ejectment claims under a separate bequest of leasehold property, and A. B. has a similar bequest by the same will, and there is also an ejectment depending against A. B. for the property so bequeathed, brought by the same plaintiff, who is the executor of the will, A. B. is a competent witness for the defendant to prove that the plaintiff assented to the legacy to the defendant.

Where a witness is objected to on the ground of his having been transported to this country to serve seven years on a conviction of felony, the party objecting must prove that such witness did not serve out the seven years, otherwise, he becomes a competent witness.

An ejectment cannot be supported by the executrix of a will for the recovery of leasehold property bequeathed by the will to the defendant, if the executrix is proved to have assented to such bequest.

**EJECTMENT.** The defendant took general defence, and issue was joined.

1. The plaintiff offered in evidence at the trial, two Proprietary leases executed by the agents of the Proprietary to William Cole. He also gave in evidence the will of William Cole, dated the 18th of January, 1769, appointing Mary Cole, the lessor of the plaintiff, his executrix, to whom letters were granted, (the other executors named in the will not acting, though there was no legal renunciation by them.) \* By the will, the testator devised to the defendant one of the leasehold estates, and to Joseph Cole he devised the other. The property was confiscated, and the defendant purchased the fee of the estate of Maryland, and obtained a grant. Both the lessor of the plaintiff, and the defendant, resided on the land until the year 1802, when the lessor of the plaintiff was forcibly turned out of possession. Joseph Cole, to whom one of the leasehold estates had been devised by the will, and against whom an ejectment by the present plaintiff was depending in this Court for the said land, was offered as a witness for the defendant, but was objected to by the plaintiff. **573**

**CHASE, Ch. J.** If it appears from the examination of a witness that he is interested, the Court will direct the jury not to regard the testimony. This can be done after a witness has been previously sworn on the *voir dire*. But the Court do not know that the authorities go so far as to say they can do so, if it appears from the testimony of other witnesses, that such witness is interested, the party having resorted to the mode of swearing the witness on the *voir dire*. See 10 *Mod.* 193; *Ambler*, 593.

This witness is called to prove the assent of the executrix to a separate legacy to the defendant. The Court think he is a good witness for that purpose.

2. Thomas Cooper was also called as a witness by the defendant. But was objected to, and the plaintiff's attorney produced one of the record books of the General Court office, in which is recorded a certificate from London, certifying that Thomas Cooper, amongst others convicted of felonies, was sent to this country to serve seven years.

**CHASE, Ch. J.** The plaintiff must prove that Thomas Cooper did not serve seven years. The presumption is that he did, and doing

The defendant may shew that the plaintiff was in possession of part of the land, and received the profits of the part of which he was possessed.

Suppose a man had been in possession of land of which he had derived no benefit, he could not be compelled to pay more than the profits derived from it, if the plaintiff resorts to that mode of proving the profits. It is not like an action of trespass for damages. It is for the use and occupation of land which was recovered in an action of ejectment.

**577** \* It would be an extraordinary thing if the plaintiff could recover profits for lands he himself was in the possession of at the time, and received the profits.

It appears that there are several tenants on the land. The plaintiff can only recover the profits according to the possession of each tenant, in an action brought against them.

2. The defendant's attorney stated, that there were three separate actions now depending in this Court for trial against separate persons for mesne profits arising from the same land. He prayed the Court to direct the jury, that the defendant in this action is only answerable for profits by him made during the time he was in possession.

*Hollingsworth, Shaaff, Buchanan and Montgomery*, for the plaintiff. The defendant cannot set up the possession of any other person to defeat the recovery by the plaintiff. He is estopped from denying the title of the plaintiff in this action from the time of demise in the declaration of ejectment. They cited *Run. Eject.* 156, 157, and 2 *Burr.* 668, where the law upon this subject is fully laid down.

*Johnson, contra.* When there is a recovery in an action of ejectment, there are different modes for recovering damages for the detention of the land. If an action for mesne profits is brought, no more than the profits received can be recovered. But if an action of trespass for damages is brought, damages are recovered for the injury sustained by the detention of the land. The judgment in ejectment does not prove the possession to the time of the judgment. It only proves the right to that possession.

CHASE, Ch. J. It appears to the Court that an action of ejectment was brought by the lessee of the \* present plaintiff **579** against the present defendant, to which he appeared and made defence. There has been a recovery against him, and a writ of possession executed to restore the possession to the plaintiff. This action is brought to recover the mesne profits during the time the defendant remained in possession.

If the plaintiff can prove his title accrued before the time of the demise in the action of ejectment, and that the defendant has



been longer in possession, he may recover antecedent profits. But in such case the defendant is at liberty to controvert his title.

But from the time of the demise, until the plaintiff was put into possession under the *habere facias possessionem*, the defendant is accountable for the profits.

If another person enters into possession during the time the ejectment is depending, the defendant is still answerable, for it is to be supposed the entry is with the consent of the defendant. But if the defendant can prove the plaintiff himself received the profits, he is then not answerable for the profits so received by the plaintiff.

Verdict for the plaintiff, and damages assessed to \$300. Judgment on the verdict for the plaintiff.

### GENERAL COURT, MAY TERM, 1805.

#### BARTON *vs.* WHITE's Adm'r.

If chattels are delivered by plaintiff to defendant for sale, and he, instead of selling them, appropriates them to his own use, and refuses to account for them, the plaintiff may sustain an action of trover.

APPEAL from Baltimore County Court. It was an action of trover, brought by the appellee against the appellant for the conversion of a quantity of paints, lead, &c. The general issue pleaded. The bill of exceptions taken at the trial states, that the plaintiff below proved to the jury that he delivered the goods mentioned in the declaration to the defendant, and gave him authority to sell and dispose of the same for and on account of the plaintiff. That the defendant, after the delivery to him, applied part of the paints, mentioned in the declaration, to his own use, in repairing his vessels. That the plaintiff demanded of \* him an account of the articles mentioned in the declaration, and payment for the same, **580** and that the defendant refused to render such an account, or to pay. Whereupon the defendant moved the Court to direct the jury, that if they should believe the above facts, that then and in such case the plaintiff is not entitled to recover in the present action. Which opinion and direction the County Court, (H. RIDGELY, Ch. J.) refused to give—but was of opinion, and so directed the jury, that if they should be of opinion, from the evidence, that the defendant converted the said goods to his own use, and refused to account for the same to the plaintiff, that this action would lie. The defendant excepted. Verdict and judgment for the plaintiff. The defendant appealed to this Court.

The General Court affirmed the judgment of the County Court.

*Purviance*, for the appellant.

*Kell* and *S. Chase, Jr.* for the appellee.

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Suppose a man had been in possession of land of which he had derived no benefit, he could not be compelled to pay more than the profits derived from it, if the plaintiff resorts to that mode of proving the profits. It is not like an action of trespass for damages. It is for the use and occupation of land which was recovered in an action of ejectment.

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The General Court affirmed the judgment of the County Court.

*Parviance*, for the appellant.

*Kell* and *S. Chase, Jr.* for the appellee.

GENERAL COURT, MAY TERM, 1805.

THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN'S:  
Lessee *vs.* HAMMOND.

The Act of 1715, ch. 47, cured no defects in the acknowledgments of deeds made under previous laws, with regard to *femes covert*.

Before that Act, as well as after, those acknowledgments were defective, unless the exact form mentioned in the Acts of Assembly on the subject, was complied with.

A certificate under the Act of 1792, ch. 55, entitled, an Act for securing certain estates and property for the support and use of the ministers of the Roman Catholic Religion, by persons stating that they were chosen, under the provisions of said Act, as trustees, to carry the same into effect, and that by virtue of such authority they assumed to themselves the corporate name and style of The Corporation of, &c. which was made by such trustees, and recorded as directed by said law, and which was accompanied with possession by them of the land in dispute, without objection by those who were interested, was held sufficient to authorize the jury to presume that such persons had been chosen in compliance with all the provisions of said law, though it did not appear by such certificate, or in any other way, that those provisions had been complied with.

Under a devise to A. and his heirs, for ever, but in case of his death before that of the deviser, or of his (the devisee) not disposing of the property devised before his (the devisee's) death, then, with a remainder over to B. and his heirs, a disposition by A. by last will, is a disposition by him in his life-time, and as such defeats the estate in remainder.

When land is devised absolutely, evidence of the acts of the deviser and devisee and other matters *de hors* is inadmissible to show that it was devised upon a secret trust; the true construction of the will depends upon the will alone. (a)

The evidence in this case held to be insufficient to prove that A. had been in possession of a certain tract, or of any part thereof, with claim of title to the whole.

EJECTMENT for a tract of land called Ayno, lying in Anne Arundel County. Defence on warrant, and plots returned.

**581** \* 1. The first bill of exceptions. The plaintiff gave in evidence a certificate of survey of the tract of land called Ayno, for which this ejectment was brought, surveyed for Henry Hanslap, on the 30th of September, 1682, for 400 acres, and a patent to him therefor, dated the 2d of August, 1682; and that said land was truly located on the plots returned in this cause. He also gave in evidence the will of Henry Hanslap, dated in the year 1697, whereby he devised Ayno to his daughter Susanna Hanslap, and to her heirs and assigns; and also gave in evidence, that Susanna Hanslap survived the deviser, and became seised and possessed of Ayno, under and in

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(a) See *Caesar vs. Chew*, 7 G. & J. 127.

virtue of the devise; and that being so seised, she intermarried with Thomas Gassaway; and he also read in evidence an entry taken from the Rent Roll for Anne Arundel County, showing that this land had been surveyed on the 30th of September, 1682, for Henry Hanslap, and that Thomas Gassaway, in right of his wife, the daughter of Hanslap, was in possession at the time the rent roll was made out, and that by the rent roll it appeared that there had been an alienation of the land on the 15th of September, 1709, by Thomas Gassaway and wife, to James Carroll. He also gave in evidence the last will and testament of James Carroll, and a codicil thereto, the former dated the 12th of February, 1728, and the latter dated the 17th of February, 1728, by which will the land is devised to Charles Carroll, cousin and god-son of the devisor, and his heirs; but by the codicil, which recites the devise to Charles of a certain part of his estate, in trust and confidence that he Charles would invest therewith his good friend Mr. George Thorold, of, &c. it is stated, that through apprehension of Charles' death, he (the devisor,) did by the codicil, confirm and give unto the said George, what he expected and did not doubt Charles would give pursuant to his intention, if death or other accident did not interpose, and also confirmed his former will in all respects, except the clause whereby he devised to Charles, amongst others the land called Ayno, which he rescinded, annulled and made void, as to Charles, and \* by the codicil he devised that land, &c. to the said George Thorold, his heirs 582 and assigns, for ever; and in case of his death, before his (the testator's,) then he devised the same, &c. unto his very good friend Mr. Peter Attwood of, &c. his heirs and assigns, for ever; and in case of both their deaths before the testator's, then he devised it unto Mr. Joseph Greateon, his heirs and assigns, for ever. The plaintiff also gave in evidence, that James Carroll died seised of the said land some time about the 27th of July, 1729, and that George Thorold, the devisee in the codicil mentioned, entered and became seised thereof. And also gave in evidence the last will and testament of George Thorold, dated the 16th of June, 1737, whereby he devised the said land unto Richard Molyneux, to him and his heirs, for ever; but in case of his death before the devisor's; or his not having disposed of it before his death, either in whole or in part, then the said devisor gave and bequeathed his said estate both real and personal, or the part remaining as above-said undisposed of, to his well beloved friend James Guin, of Queen Anne's County, to him and his heirs, for ever. The plaintiff also gave in evidence, that George Thorold, died seised and possessed of the said land called Ayno, and that after his death, Richard Molyneux, the devisee in the said last mentioned will named, did enter into the land under and by virtue of the said will, and became seised thereof, and afterwards died, having first made and executed his last will and testament, dated the 28th of April, 1749, which the plaintiff gave in evidence; whereby the

said Molyneux gave and devised all his real and personal estate wheresoever, and of what denomination soever, to his well beloved friend George Hunter, of Charles County, or in case of his death before the said devisor, to his well beloved friend Benedict Neale, of Baltimore County, them, their heirs or assigns, for them and their use and behoof for ever. The plaintiff also gave in evidence, that after the death of Richard Molyneux, George Hunter, the devisee in the said last mentioned will, entered into the said land called

**583** Ayno, under and \* by virtue of the will, and became thereof seised, and being so seised, afterwards, to wit, the 22nd of July, 1778, duly made his last will and testament, and then died, leaving the same in full force and unaltered, by which will he devised the said land called Ayno, in fee simple, to James Walton, who entered into the said land under and by virtue of the said devise, and became thereof seised. The plaintiff also read in evidence an Act of Assembly passed in 1792, ch. 55, (November,) authorizing the Roman Catholic Clergy to declare the uses for which certain estates had been held by them, and to assume a name and style of corporation. The plaintiff also gave in evidence, that the said James Walton being so seised, did afterwards make and execute a deed or declaration, which, with the several endorsements thereon made, was produced and read in evidence, to wit: "I, James Walton, of the County of Saint Mary's, and the State of Maryland, do by virtue of these presents make known, publish and declare, in conformity and agreeably to an Act of Assembly of the State of Maryland, entitled 'An Act for securing certain estates and property for the support and uses of the ministers of the Roman Catholic Religion,' that the real property hereafter specified, viz. St. Inigoes Manor, &c. &c. Hainault, commonly called Ayno, lying in Anne Arundel County, &c. and also all other my lands and real estate whatsoever in the State of Maryland, and all the mixed and personal property annexed and appertaining to these several estates, hath been and now is held by me the said James Walton, under a confidential or implied trust, for the use, benefit and maintenance of the ministers of the Roman Catholic Church, now exercising their ministerial functions within the United States of America, agreeably to the rule and discipline of their church, and who were formerly members of the religious society, heretofore known by the name of The Society of Jesus. In testimony whereof I have hereunto set my hand and seal this 3d of October, 1793.

JAMES WALTON, [L. S.]

Signed, sealed and delivered, in the presence of

HENRY BARNES, HENRY H. CHAPMAN."

**584** \* Acknowledged the 3d of October, 1793, by the said James Walton, as his act and deed, before the said Henry Barnes and Henry H. Chapman, being justices of the peace for Charles County. An oath annexed, taken by the said Walton, before the said justices, that the said estates were held by him for pious pur-

poses acquired before the 14th of August, 1776. Recorded in the General Court land records the 15th of October, 1793.

The plaintiff also read in evidence, a declaration, with the several endorsements thereon, which is as follows: "Whereas an Act of the Assembly of the State of Maryland was passed at the session begun in the month of November, 1792, entitled, An Act for securing certain estates and property for the support and uses of the ministers of the Roman Catholic Religion: And whereas it is therein enacted, that trustees be chosen for certain purposes expressed in the said Act, we, the undersigned, being so chosen, hereby declare, that we have assumed, and do assume the style, name and title, of The Corporation of the Roman Catholic Clergymen, by which we, and our successors, for the time being, are to be designated and known; and that we hereby certify the same under our hands and seals, at St. Thomas' Manor, Charles County, this 5th of October, 1793.

		JAMES WALTON,	[L. S.]
		JOHN ASHTON,	[L. S.]
		LEONARD NEALE,	[L. S.]
Test,	HENRY PILE,	ROBERT MOLYNEUX,	[L. S.]
	JOHN BOLTON.	CHARLES SEWELL,	[L. S.]

Recorded in the law records of the State in the General Court office the 15th of October, 1793.

The plaintiff also gave in evidence, that the plaintiff, and those under whom he claims, have been at all times, since the 15th of September, 1709, in the actual possession of the land called Ayno, claiming the same as their estate in fee simple under and by virtue of the said patent, and several wills and declarations \* before set forth. The plaintiff also gave in evidence sundry depositions of witnesses, admitted to be read, proving that the said land had always been claimed and held by the plaintiff, and those under whom he claims, since the recollection of the witnesses. 585

The defendant produced and read in evidence to the jury, a deed for the said land called Ayno, from Thomas Gassaway, and Susanna his wife, to James Carroll, dated the 15th of September, 1709, together with the endorsements on the said deed. The acknowledgment of which deed is in these words: "September 20, 1709. Then came before us, Richard Jones, Junr. and Thomas Larkin, two of her majesty's justices for the County of Anne Arundel, Thomas Gassaway within mentioned, and acknowledged this deed according to Act of Assembly; also Susanna his wife, daughter and legatee of the within mentioned Hanslap, who being examined according to law, declared that she consummates this deed without the compulsion or coercion of the said Thomas her husband. In testimony whereof we have hereunto set our hands the day and year above." And the defendant then prayed the opinion of the Court, and their direction to the jury, that this deed was inoperative to pass the

estate and interest of said Susanna in and to the said land, except during the life of her said husband.

*Harper*, for the plaintiff, contended, that the Act of 1699, ch. 42, was not repealed by that of 1715, ch. 47, but was repealed by the Act of 1715, ch. 49. That the deed under consideration was made in 1709, and must have been acknowledged under the Act of 1699, ch. 42, s. 6. That the 7th section of the Act of 1715, ch. 47, declares that all deeds made during the continuance of the Act of 1699, ch. 42, if enrolled within 12 months, (the time limited by that Act,) should be valid, notwithstanding other defects. This deed was enrolled within the time prescribed, and the defect of the acknowledgment has been aided by the Act of 1715. In this case the defendant does not claim under any title adverse to the title of the plaintiff: In \* the case of *Pattison vs. Chew*, (a) deeds similar  
**586** to the present one, were objected to on account of the defect

(a) *PATTISON'S Lessee vs. CHEW*. General Court, October Term, 1790. This was an action of ejectment for Town Land, or Evans' Purchase, Hunt's Mount, and Trent, lying in Anne Arundel County. Defence was taken on warrant, and plots were made.

1. The plaintiff, at the trial, offered in evidence, and read to the jury, the certificate and patent of the land called Town Land, or Evans' Purchase. The defendant located on the plots, two lines of the land called Town Land, or Evans' Purchase, and took defence for all the land included in his location of a tract of land called Ayres, which lies to the south of one of the said lines; and to prove his said location of the said two lines, and also his location of the land called Ayres, for which he took defence, produced and read to the jury the deposition of John Carr, taken at the beginning of the location of the said two lines, and read by the consent of the plaintiff, viz., "The deposition of John Carr, aged 75 years, being duly sworn, deposeth and saith, that about 80 years ago, he, this deponent, had a commission, and this place we are now at, where formerly stood a cedar post, was proved by George and William Simmons, and sundry others, to be the beginning of Kequotan's Choice, and a corner tree of Samuel Chew's land that lays to the S. W. of this place." &c. The defendant produced to the Court, and offered to read in evidence to the jury, a paper, the same being the whole proceedings appearing on record relative to the said transaction, [viz., the commission and return alluded to in Carr's deposition,] to which the plaintiff objected, because the said two lines so located as above mentioned on the plots, were not agreeable to the certificate or grant of the said land, or to the description in the said paper; and because the said lines and courses in the paper mentioned, were not located, or mentioned to be located by the defendant on the plots in this cause; and because the whole proceedings were not produced, including the plot and survey in the said paper mentioned to have been made and returned.

JOHNSON, Ch. J. (a) was of opinion, that the paper offered in evidence was proper evidence to prove, by general reputation, the location of the lands called Ayres and Evans' Purchase, or Town Land, and the ancient possession of the respective proprietors of the same. The plaintiff excepted.

(a) GOLDSBOROUGH, J. was absent, and CHASE, J. had been counsel in the cause.



in the acknowledgments by the *feme covert*; the deeds were dated in 1706 and 1707, and the Court said, "that there was nothing in the certificates of the acknowledgments of the deeds repugnant to the directions of the Act of Assembly directing the manner of acknowledging deeds at that period, and that the said deeds were sufficient in law to pass the estate of the *feme covert* in the said lands." The Courts will favor a remedial Act, and protect a title of a century which has never before been controverted as to the whole of this land.

\* *Martin*, (Attorney-General,) for the defendant.

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CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) This question has been frequently decided by this Court. The certificate of the acknowledgment should be in the manner the law directs, and unless so done, the acknowledgment is defective, and the deed cannot operate so as to bar the female covert. In this case the acknowledgment is defective, and the deed cannot operate to pass the estate

2. The defendant, to make title to the land for which he took defence, produced to the Court two deeds from Thomas Watkins, and Mary his wife, who was entitled to the fee simple in the said land, to Samuel Chew, Junior, one dated the 28th of February, 1706, and the other dated the 17th of March, 1707, and acknowledged on the day of their respective dates, as follow: "Memorandum, the, &c. came the within Thomas Watkins, and Mary his wife, before me, &c. one of her majesty's Justices of the Provincial Court, and the said Mary having been first privately and secretly examined, touching her consent to the alienation of the within granted land and premises, she then freely, and afterwards, together with her husband the said Thomas Watkins, acknowledged the said within granted land and premises to be the right and estate of the within mentioned Samuel Chew, Junior, his heirs and assigns, according to the purport and intent of the within indenture, and according to the Act of Assembly in that case made and provided for acknowledgment of conveyances." And the defendant offered to make title to the said land under and from the said Samuel Chew. But the plaintiff objected to the reading the said deeds to the jury, for the purpose of making title to the land therein mentioned, and that the deeds and acknowledgments were defective, and not sufficient in law to pass the estate of the said Mary Watkins.

JOHNSON, Ch. J. was of opinion, and so instructed the jury, that there was nothing in the certificates of the acknowledgments of the said deeds repugnant to the directions of the Act of Assembly directing the manner of acknowledging deeds at that period, and that the said deeds were sufficient in law to pass the estate of the said Mary Watkins in the said land. The plaintiff excepted.

*Martin*, (Attorney-General,) and *Pinkney*, for the plaintiff.

*Cooke* and *Duvall*, for the defendant.

Verdict for the plaintiff, agreeably to his pretensions, for that part of Hunt's Mount described on the plots F. &c. also for Town Land, &c. from D. &c. and for the defendant, as to the residue, according to his pretensions.

N. B.—As this case has not been before reported, it is here given at length, although the question which arose under the second bill of exceptions, was alone referred to.

of the *feme covert* in the land, except during the life of her husband. The plaintiff excepted.

2. The defendant prayed the opinion of the Court, and their direction to the jury, that before the plaintiff can recover in this action, it must be proved that the ministers of the Roman Catholic Religion within the State, being citizens thereof, exercising ministerial functions agreeably to the rules and discipline of their church, did convene and appoint, from their own body, persons who did assume the style, name and title, in the manner pointed out by the 3d section of the Act of November Session, 1792, ch. 55.

**589** \* *Key*, for the defendant. The 3d section of the Act of Nov. 1792, ch. 55, directs "that it shall and may be lawful for the ministers of the Roman Catholic Religion within this State, citizens thereof, exercising their ministerial functions agreeably to the rules and discipline of their church, and in whose favor the said declaration shall have been made," [alluding to the declaration in the 2d section to be executed by the proprietors of property held in confidential trust, &c.] "to convene at a place to be by them agreed on, within twelve months from the passage of this Act, and then and there adopt such regulations, for the management of their estates and temporalities, as shall seem fit and advisable to a majority of the ministers so convened; and the said ministers, or a majority of them, so met, shall then and there choose, from their own body, certain persons, not less than three nor more than five, who shall assume the style, name and title, by which they are to be designated and known, and shall certify the same, under their hands and seals, within three months thereafter, to the clerk of the General Court of the Western Shore, who is hereby authorized and required to record the same in the records of the laws of the State," &c. The declaration of the clergy assuming the style, &c. does not state that the persons pointed out by the Act met and made choice of the persons, who have by this declaration assumed the style. These persons have said, that they had been so chosen, but they do not say who had chosen them, at what time, or at what place. This Act creates a special authority, and it is a general rule, that a special authority must be pursued precisely. In this case, then it must appear that the persons described in the law gave notice of their intention to meet at a certain place, on a certain day, for the purpose of choosing the persons pointed out by the law; that they met on the day and at the place, and made the choice of persons answering the description, and those persons must certify that they did assume the style, &c. Instead of this they say, "We, the undersigned, being so chosen," &c. without stating that they had the \* authority  
**590** prescribed by the Act to make the declaration that they had assumed the style of incorporation. It is not sufficient for them to say they had been chosen—But it must appear how and in what

manner they were chosen, and all legal requisites must appear to have been complied with under the Act of Assembly, as in land commissions. It has been repeatedly decided in this Court, under the Acts for marking and bounding lands, and for perpetuating the bounds of land, that unless it was shewn by the return of the commissioners how and in what manner the same had been executed, the return was insufficient, and that a certificate of the commissioners that they had given the notice directed by the law, without saying what notice, was fatal. Cites *Weems vs. Disney*, 4 Harr. & McH. 156.

*Shaaff*, for the plaintiff. The gentleman, who has just urged the objection to the Court, was one of the members of the Legislature at the time the law passed, and no doubt was friendly to the passage of the Act. It was not his intention certainly that no benefit should result to the clergy by the law. But if this declaration is adjudged defective, the Legislature have done little for the benefit of the Roman Catholic Clergymen. The Act directs that they shall "certify the same." What was intended by the law to be certified? The style, no doubt, of incorporation. This has been done, they have certified the style, which is directed to be recorded amongst the laws of the State. The declaration says, "being so chosen"—meaning no doubt, in pursuance of the Act. The Act does not require that the proceedings should be recorded. It only directs that a declaration of the style, which may be assumed, shall be recorded. How is the Act to be construed? It surely meant to hold out a benefit to the clergy, and should be construed beneficially, and the Court will strive not to defeat the salutary provisions of the Legislature.

*Harper*, on the same side, cited *Bank vs. Ross*, 4 H. & McH. 456.

*Martin*, (Attorney-General,) in reply, referred to *Whetcroft vs. Dorsey*, 4 H. & McH. 357; *Harper vs. Hampton*, *post*, 622.

CHASE, Ch. J. The Court are of opinion, that the declaration, that the ministers of the Roman Catholic Religion have assumed the name, style and title, of "The Corporation of the Roman Catholic Clergymen," agreeably to the law, if accompanied with evidence that the lessors of the plaintiff are, and ever since the recording the said declaration have been, in the sole use, occupation and control, of the land for which this action is brought, without objection from those interested, it is sufficient to induce the jury to presume, and they ought to presume, that the ministers had assembled and made choice of the persons who assumed the said name, style and title, and that all previous requisites had been complied with according to the Act of 1792, ch. 55.

There was no exception taken to this opinion.

3. The second bill of exceptions. The defendant then prayed the opinion of the Court, and their direction to the jury, that the will of

Richard Molyneux did not operate to pass a fee simple estate to George Hunter, the devisee in the said will named, so as to enable him to devise the same by will, but that on his death the fee simple estate in the land called Ayno, in the declaration mentioned, did pass by virtue of George Thorold's will to James Guin and his heirs.

*Johnson*, for the defendant, objected to the will of George Thorold as not devising a fee simple to Richard Molyneux. From the expressions in the will, a fee simple is devised to Molyneux, with an  
**597** \* executory devise to James Guin. The words of the will are—"I give all my estate, both real and personal, &c. to Richard Molyneux of Charles County, to him and his heirs for ever; but in case of his death before mine, or his not having disposed of it before his death either in whole or in part, then I give and bequeath my said estate, both real and personal, or the part remaining as above undisposed of, to my well beloved friend James Guin, of, &c. to him and his heirs for ever." Richard Molyneux having, by will, devised the estate, it is not such a compliance with the will as the testator contemplated. The estate therefore became vested in James Guin, and could not pass under the devise in the will of Richard Molyneux. Where a future interest without a preceding estate, or a contingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee simple, is limited by a devise, such limitation, as it cannot be good as a remainder, may take effect as an executory devise. 2 *Fern. Cont. Rem.* 17. An executory devise is good if it takes effect. In the case of joint tenants, upon the death of one, the estate survives, and the right by survivorship overreaches any disposition by the other joint tenant. Executory devises are not to be defeated by any alteration whatever in the estate out of which, or after which it is limited. A secret trust is not countenanced by our laws, and if this was a secret trust, it was illegal and cannot be resorted to in order to aid the will. The case is to be considered as if the question had occurred on the will of any other person. If Molyneux did not by deed dispose of the estate, the moment he died it vested in Guin. It is precisely like the case of joint tenants—upon the death of one, the estate goes over to the survivor. Could Molyneux by will defeat the disposition by Thorold, who had limited the estate to Guin, if he (Molyneux) did not in his life-time dispose of it? The object of the defendant is to show that the title is not in the plaintiff.

*Harper and Shaaff, contra.*

*Key and Martin*, (Attorney-General,) in reply.

**601** \* CHASE, Ch. J. (SPRIGG, J. concurring.) The question is, whether the will of Richard Molyneux is such a disposition as to defeat the executory interest of James Guin, the remainderman over. The Court are of opinion, that the will of Richard Moly-

neux is not such a disposition of the estate so as to defeat the devise over to James Guin, the remainder-man, and that it did not pass a fee simple estate to George Hunter, so as to enable him to devise the same by will, but that on the death of Richard Molyneux the fee simple did pass by virtue of Thorold's will to James Guin, and his heirs. The will of Richard Molyneux was at all times during his life subject to revocation, and the Court think the estate was not disposed of before his death.

DONE, J. did not concur in the opinion of the Court. He was of opinion, that the devise in the will of Richard Molyneux was a disposition of the estate.

The plaintiff excepted to the Court's opinion.

1. The third bill of exceptions. The plaintiff then to support the issue on his part, gave in evidence to the jury, the patent to Henry Hanslap, the will of Henry Hanslap devising to his daughter Susanna; and \* the deed from Gassaway, and Susanna his wife, to James Carroll; and that the said Carroll entered and became seised, and being seised devised to Thorold; the will and codicil of Carroll; the will of Thorold; the will of Molyneux; the will of Hunter; the Act of Assembly, &c. and the declaration by James Walton. And also gave in evidence, that Thorold, Molyneux, Hunter, Walton and James Guin, were severally, in their life-time, priests and ministers of the Roman Catholic Religion. And to prove that the said Carroll, Thorold, Molyneux, Hunter, Walton, and the lessors of the plaintiff, have at all times, from the 15th of September, 1709, been in the actual possession and occupation of the said land called Ayno, under the patent thereof, and under the said deed, several wills and declarations mentioned, claiming the same as their estate, gave in evidence an extract from the rent roll of Anne Arundel, showing that the said land was surveyed for Henry Hanslap the 30th September, 1682, and possessed by Thomas Gassaway in right of his wife, the daughter of Hanslap, who alienated to James Carroll on the 15th of September, 1709. And also gave in evidence the plots and explanations in this cause, and the depositions taken on the survey, and the plots and explanations, and depositions taken and filed in an ejectment formerly depending in this Court, in which the present defendant's lessor was plaintiff, and a certain John Ashton, priest, was defendant; and also, that for more than forty years last passed, the priests of the Roman Catholic Religion, and after them the lessors of the plaintiff, have held, possessed and occupied, the said land called Ayno, by themselves and their agents, cultivating part, and claiming the whole as their estate in fee simple, and that there is no recollection or tradition of the said land, or any part of it, having ever been held or claimed as such by any person or persons other than the priests and their agents, and the lessors of the plaintiff and their agents.

But the defendant, by his counsel, objected to the said testimony for the said last mentioned purpose.

**603** \* CHASE, Ch. J. (SPRIGG, J. concurred.) The Court are of opinion, and so direct the jury, that the matters offered in evidence, for the purpose of proving that Carroll, Thorold, Molyneux, Hunter and Walton, were in possession as aforesaid, are not proper or competent evidence to prove that George Hunter was in possession of the land, or any part thereof, claiming the whole. The plaintiff excepted.

5. The fourth bill of exceptions.—The plaintiff, for the purpose of proving that the land for which the ejectment was brought, and other large estates, had at all times been held, claimed and occupied, by the said Thorold, Molyneux, Hunter and Walton, being priests and ministers of the Roman Catholic Religion, so far as they had or supposed themselves respectively to have had any right, title or interest, in and to the same, on a secret and confidential trust for the use, support and maintenance, of the ministers of the Roman Catholic Religion in this State, and that the object and intention of the said Thorold in making his will, was to provide a trustee for holding the said lands and estates in case the said Molyneux should either die in the life-time of the said Thorold, or in case of surviving him should omit to devise or convey the said lands and estate to some proper person, who might hold the same as trustee, and transmit it in like manner, offered in evidence all the matters stated in the next preceding bill of exceptions; and also offered in evidence, for the purpose aforesaid, that for many years last passed, the rents and profits of the lands mentioned in the declaration of the said James Walton, had been applied by the persons respectively holding the same, to the use and support of the ministers of the Roman Catholic Church in this State. But the defendant objected to the said evidence for the purpose aforesaid.

CHASE, Ch. J. The Court are unanimous in their opinion, that they cannot take notice of any secret trust, and in the construction which they have given \* to the will of Richard Molyneux, **604** they did not take into view any extraneous matter. They think that the true construction of the will must depend alone upon the will itself. The Court therefore refuse to receive the said facts and circumstances for the purpose for which they are offered, being of opinion that the said facts and circumstances can have no influence in deciding on the true construction of the said will. The plaintiff excepted.

*Shaaff* stated, that by the decision which the Court had given on the construction of the will of George Thorold, an estate of upwards of £30,000 was thrown into jeopardy. That the point had been

raised by the opposite counsel very unexpectedly, and that the counsel for the plaintiff had had no opportunity of examining it. That he had just met with an authority which, with the permission of the Court, he would read to them. *Powell on Powers*, 55 to 57, cited *Com.* 194; *Salk.* 239; 1 *Wils.* \* 149. In *Powell on Powers*, 57, a devise to a wife for life, and "after her decease," she to give them "to whom" she would. The wife granted the reversion to a stranger. It was adjudged she might grant away the reversion in her life-time. He also cited 3 *Leon.* 71; *Ambler*, 64; 2 *P. Wms.* 469; 1 *Cha. Cas.* 284. **605**

THE COURT, however, continued of the same opinion.

Verdict and judgment for the defendant. The plaintiff appealed to the Court of Appeals. The appeal, by agreement of the parties, was put to issue, and came on for argument at the first term, in June, 1805, on the second bill of exceptions. The other bills of exceptions are stated to have been withdrawn by the counsel of the parties.

*Shaaff*, for the appellant, on the second bill of exceptions. The only facts material on this exception are—that James Carroll, being possessed of the land in dispute, devised it to George Thorold in fee; that Thorold entered and devised to Richard Molyneux in these words: "I bequeath all my estate, both real and personal, that is to say, &c. to Richard Molyneux, to him and his heirs for ever; but in case of his death before mine, or his not having disposed of it before his death, either in whole or in part," then there is a devise over to James Guin and his heirs. Molyneux made his will, devising all his real and personal estate to George Hunter, and in case of his death in the life-time of the testator, then to Neale, to them and their heirs, &c. It does not appear that Molyneux had any other estate to devise to Hunter except what he derived under Thorold's will. The General Court determined that the will of Molyneux did not pass a fee to Hunter, so as to enable him to devise it, but that on the death of Molyneux the estate in the land for which the ejectment was brought, passed over to James Guin.

\* In the examination of this subject it is necessary to consider two general questions: **606**

1. Whether Molyneux had, under Thorold's will, any authority to devise the estate?

2. Whether, supposing Molyneux to have that authority, he has in fact made such a will as will pass the estate?

First question.—Had Molyneux, under Thorold's will, any authority to devise the estate?

In the consideration of this question it is material to examine into the nature of the estate devised to Molyneux by Thorold's will. He can only be considered as taking either an estate for life, with a

power to dispose of the inheritance before his death, and in default of such a disposition, a devise over to Guin; or he took an estate in fee, the estate of inheritance, subject to be divested upon his not disposing of it before his death. Under the will, he was tenant of the fee; but if he took either estate, he had equally the power to dispose of it by last will.

As to the execution of powers, &c. see 3 *Burr.* 1446; *Coup.* 260-265; 3 *Cha. Ca.* 69; *Hob.* 312; *Pow. on Powers*, 61, 55, 57, 111; *Raym.* 295; *Com. Rep.* 194; *Salk.* 239; 1 *Wils.* 149. Molyneux took an estate of inheritance, subject to be divested by his not disposing of it before his death. *Powell on Dev.* 251; 2 *Bl. Com.* 373-4; 6 *Com. Dig. tit. Poiar*; *Robert vs. Morgan*, 1 *Atk.* 441; *Moulton vs. Hutchinson*, 1 *Atk.* 559.

*Pinkney*, on the same side contended, (on the second bill of exceptions) that, under the devise to him, Molyneux \* took a fee. **617** The object is admitted on all hands to have been to give to Molyneux, during his life, complete control over the estate—to dispose of it as he thought proper. This object was to be accomplished in two ways—1. By making him tenant for life, with power to dispose of the fee. 2. By making him tenant in fee, and adding a defeazance in case he did not dispose.

In the first case the uses raised by the power would be served out of the devisor's estate. In the second, the act of the devisee would take effect out of the fee passed to him for the purpose of enabling him to dispose. The power of disposition would arise out of the nature of the estate devised, and be one of its qualities. The first of these modes was certainly not adopted *in terminis*, although undoubtedly, if it were necessary to resort to implication, the power might be and would be implied. 6 *Com. Dig.* 2, (A. 2.) But the second mode is adopted expressly, by a devise of the land "to Molyneux and his heirs for ever." These words necessarily pass a fee, unless plainly controlled by others. But there are none others to control them. The power of disposition, belonging to and characterizing a fee, is impliedly recognized; but this rather confirms than controls. The defeazance is nothing; it may be annexed to an estate in various ways, and does not lessen it, till the event happens by which it is to be destroyed; and the purpose of it was simply to guard against accidents. The intent of the testator is clear that Molyneux should have a fee. It was obviously his meaning that he should have power to dispose absolutely; yet he gives no such power in words. He proceeds on the supposition that the power belongs to the estate devised, *i. e.* an estate to Molyneux, and his heirs. He takes the power for granted; he speaks of it as existing, and only makes ulterior provisions on the event of Molyneux's omitting or neglecting to use it. A devise to a woman, and to be at her disposal, "provided she disposes of it to my children"—it was held



to be a fee, determinable \* on a disposition by her to others than the testator's children. *Powell on Powers*, 55, 57. If **618** then it is a fee, the right to devise it necessarily arises out of the estate, and the Court, before they can be justified in deciding such a devise void, must see clearly and affirmatively that there is in the will a negative upon that right. The testator having devised a fee, that estate will be kept in possession of all its qualities, and be suffered to produce all its legal effects, except so far only as a limitation is placed upon it by the will; and as a power to devise is one of its qualities, that power must appear to be unequivocally taken away by the will giving the fee, before the Court can say it did not exist in Molyneux. It is otherwise in the case of a mere power. There the right to devise must stand on the words of the power. It does not exist if not granted; and before the Court can say it does exist, they must see clearly that it is given. In a word, when a fee is given, as here, the right to devise exists if not taken away. In a power it does not exist if not unequivocally granted. This case therefore is more favorable than a case upon a mere power, whether reserved or granted; and consequently cases upon powers, which will be cited hereafter, must apply to it with peculiar force and effect. With these preliminary observations in view I will proceed to a consideration of Thorold's devise. It may be considered in a two-fold view: 1. On the general intent. 2. On the words, or particular intent.

1. On the general intent. It has already been shown, that if the estate was held in trust, the testator's general intent was to make provision for perpetuating trustees; that Molyneux was the trustee whom he preferred, and that Molyneux was to provide a successor to himself. That as he, Thorold, provided a trustee by will, and Carroll before him had done the same, he could not have meant to deprive Molyneux of the same power, but intended to give it. The rule is, that you are so to construe a will as best to give effect to the testator's general intent, even though by so \* doing you may defeat some particular intent. *Doe on Dem. Blandford et al.* **619** *vs. Applin*, 4 T. R. 82; *Robinson vs. Robinson*, 1 Burr. 38. In this case I will show that no particular intent is or can be defeated by supporting this general intent. But let us even suppose that the estate was no trust—Then the general intent is to give such a control to Molyneux over the fee as tenants in fee usually have, and to grant over only in case he should not execute that control. This is evident, 1st. By his devising to him in fee, which imports an unlimited control. 2d. By the words of defeazance, which speak of a disposition without any limitation during his life. Molyneux was therefore to do with the estate as he pleased; to dispose of it as he pleased. What motive could induce the testator to place the estate absolutely at Molyneux's disposal during his life, by deed, and

exempt it from a disposition by will? If he might sell or give it away by deed on his death-bed, why not devise it? What rational ground of distinction? Caprice and folly might suggest a distinction, but reason could suggest none. In a word it would be inconsistent with the general intent, and therefore not to be admitted, if it can be avoided.

2. But the words, and the particular intent, are in correspondence with the general intent. The words used are, "die without having disposed of it before his death." These words may be divided, and separately considered. 1. "Without having disposed of it." 2. "Before his death." 1. "Before his death," can make no change. They were introduced perhaps to guard against a descent. But for whatever reason introduced, as every disposition by the act of a party must be made during the life of that party, these words add nothing to the others. They imply no more than the act, whatever it was, should be during the life of Molyneux.

2. "Without having disposed of it." It is said that devising is not disposing of it, within the intent of these words. I contend it is, whether the words are considered technically or vulgarly. That a will is a disposition of lands, and consequently that the testator disposes of them, is too clear to be disputed. A devise is a disposition of a real or personal estate, to take effect after the death of the devisor. *Com. Dig. tit. Devise, and Co. Litt. 111 a.*

\* Whether therefore the subject be considered, as it ought to  
**621** be, upon the ground that the thing devised was held in trust, (in which case there can be no room for reasonable doubt that one interpretation of the will is sound,) or whether that ground be excluded, it is clear that Molyneux took a fee, and had power to devise as he has done. He also cited *Powell on Powers*, 55, 57; *Hob.* 312; 1 *Ves.* 299; 2 *Vern.* 329.

*Martin*, (Attorney-General,) *Key and Johnson*, for the appellee, did not argue the case in the Court of Appeals.

The Court of Appeals, [RUMSEY, Ch. J. JONES, POTTS and DENNIS, J.] reversed the judgment of the General Court upon the second bill of exceptions, (the other bills of exceptions having been waived,) and awarded a *procedendo*.

**622**

\* GENERAL COURT, MAY TERM, 1805.

HARPER vs. HAMPTON.

If a contract be made in South Carolina with a view to the receipt of money in Pennsylvania, the cause of action accrues upon the receipt of the

money in Pennsylvania, and the Statute of Limitations of South Carolina is not a bar to the action. (a)

If A. contract with B. to sell a quantity of land belonging to the latter, under an agreement that he is to have one-half of the purchase money, A. is competent, if he does sell, to maintain an action in his own name for the whole of the purchase money, and it is not necessary that B. should join in the action. (b)

In the construction of a contract, the Court will be governed by the apparent meaning of the parties, to be collected from the language of the contract and the nature of the transaction, and will not rely on the technical meaning of the words used. (c)

In construing a contract, extraneous matter explanatory thereof may be resorted to. (d)

What seems to be technically a warranty may be considered to mean generally any engagement by which a liability is created, where such appears to be the intention of the parties.

A covenant can only be dissolved by a matter of equal solemnity with itself. (e)

If a breach of covenant has accrued, accord and satisfaction is a good plea, but it is not a good plea as to breaches which had not taken place at the time when accord and satisfaction were made. (f)

A. in Charleston, authorized B. his agent in Philadelphia, to sell and convey certain land belonging to him; and to enable B. to do so, conveyed the

(a) The *lex loci contractus* controls the nature, construction and validity of the contract, but the remedy upon the contract is governed by the *lex fori*, *Trasher vs. Everhart*, 3 G. & J. 234. This case is approved in *Pritchard vs. Norton*, 106 U. S. 133. Cf. *Smith vs. McAtee*, 27 Md. 420; *Eastwood vs. Kennedy*, 44 Md. 572. Statutes of Limitation, which only bar the remedy, are laws of the *forum* only; consequently a Statute of Limitations of a foreign country, or of another State, when the contract was made, cannot be pleaded in bar. *Townsend vs. Jemison*, 9 Howard, 407; *Hanger vs. Abbott*, 6 Wallace, 588.

(b) Where an agent is interested, as for commissions or by reason of special property in the subject-matter, and the contract in reference thereto is made in his own name, it is competent for him to maintain an action in his own name as if he were the principal. *Telegraph Co. vs. Gildersleeve*, 29 Md. 232.

(c) Approved in *Taylor vs. Turley*, 33 Md. 507. Whatever may have been the principles of the more ancient decisions upon the legal effect and operation of contracts containing various covenants, the strong inclination of the Courts in more modern times has been to disencumber themselves from the fetters of technical rules, and to give such a rational interpretation to contracts as will carry into effect the intention of the parties. *Watchman vs. Crook*, 5 G. & J. 239. See *Mitchell vs. Mitchell*, 2 Gill, 238; *Dixon vs. Clayville*, 44 Md. 578.

(d) See *Stockham vs. Stockham*, 32 Md. 196; *Ins. Co. vs. Doll*, 35 Md. 90; *Warfield vs. Booth*, 33 Md. 63; *Krebs vs. Jones*, 44 Md. 396.

(e) The obligation arising from a sealed contract can generally be discharged only by an instrument under seal. *State vs. Gott*, 44 Md. 347.

(f) Accord and satisfaction is something more than strict performance or payment; it is doing that by the covenantor which the covenantee accepts in lieu of a performance of the terms of the covenant. *Ins. Co. vs. Hamill*, 5 Md. 170.

land to him and agreed that if B. should enter into any guaranty about the land, A. would indemnify him therefor. B. sold the land in Philadelphia, and agreed that within ten days after the sale, he would convey the same to the purchaser—by a good and sufficient deed. The deed from A. to B. proved to be defective, so that B. was not able to convey the land by a valid deed in the time agreed on, and since A. was in Charleston, it was impossible for him to have notice and perfect the title within the ten days. The purchaser accepted a deed from B. without objection. In an action by the principal against the agent for the purchase money received by the latter, it was *held* that although the plaintiff could not perfect the title within the ten days, he was bound to give an indemnity to the defendant for the warranty which the latter had entered into about the land, and that the plaintiff not having given the stipulated indemnity could not recover, although no objection to the deed had ever been made by the purchaser, and no claim had been made on the defendant on his contract of guaranty, and the defendant had never informed the plaintiff that the deed was inoperative.

Where notes are received by an agent for his principal, and are held by the agent as a deposit, until certain engagements of the principal to the agent are fulfilled, and the notes become of no value while they are so held by the agent, the loss must fall on the principal.

But if the agent sells the notes, while they are so held by him, for less than their nominal value, without authority from his principal, and subsequently the engagements of the principal are discharged, and the notes rise in value, the principal can recover from his agent the increased value of the notes; or, if the notes become entirely worthless, the principal may elect to affirm the sale made by his agent, and may recover from him the price at which they were sold. But in such case the principal must prove an actual sale of the notes, and the price for which they were sold, or the principal may show an actual conversion of the notes by the agent, and their value at the time of their conversion.

A stipulation in a contract, on the part of a principal, that for any warranty or guaranty, his agent should enter into touching the sale of the principal's land, he would give him a sufficient indemnity, *Held*, to be a condition precedent to stipulations on the part of the agent, that a deed of the land was to be delivered by him to J. H. upon his paying the purchase money, which was to be received by the agent for his principal and accounted for to him.

Under the above contract the agent was not bound to pay over to his principal certain notes received for him, until the agent was indemnified against his liability under an engagement entered into about the sale of the land.

Where an agent sells the land of his principal, together with other land, and agrees with the purchaser to have the whole re-surveyed, he should give his principal notice of such re-survey; and whether there be such an undertaking, and if so, whether the notice be in fact given, are facts for the decision of the jury.

A party has a right to a continuance of the action when testimony obtained under a commission returned at the present term is about to be used by the opposite party.

The Court decides on the competency of evidence and not on the effect of it.

A deed by an attorney is invalid unless his authority is strictly pursued. Such a deed should be in the name of the principal. (a)

The validity of a deed conveying land in another State is to be determined by the laws of this State, unless the law of such other State be given in evidence. (b)

When it is necessary that an agent should give notice to his principal and under what circumstances a jury may presume that such notice was given.

When an agent contract a liability for his principal, and the principal has stipulated to save him harmless, he is not answerable to the principal until such security is given him, though many years have elapsed without his having been called on to answer for such liability.

The tender of a bond of indemnity, after action brought, is insufficient when indemnity is necessary to the plaintiff's recovery.

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(a) Approved in *Wanamaker vs. Bowes*, 36 Md. 55. Under Rev. Code, Art. 44, secs. 28, 30, every power of attorney authorizing an agent or attorney to sell and convey any real estate shall be attested and acknowledged in the same manner as a deed, and recorded with the deed executed in pursuance of such power. And any person executing a deed conveying real estate as agent or attorney for another shall describe himself in, and sign the deed as agent or attorney. A deed professing to be made under and by virtue of a power of attorney is inadmissible in evidence without the letter of attorney. It is only by the power of attorney that the real owner is connected with the conveyance and it is through the medium of such power that the title is transferred. The deed of itself is without operation, and the recitals in it can prove nothing either as against the real owner or third persons. *Ins. Co. vs. Doll*, 35 Md. 108. Cf. *Onion vs. Hall*, 1 H. & McH. 118; *Beall vs. Lynn*, 6 H. & J. 347.

(b) In *Connolly vs. Riley*, 25 Md. 419, it is said that "in the case of *Harper vs. Hampton*, a question was raised in regard to the validity of a deed of lands in South Carolina, and it was held that the laws of another State, when proved, would govern in determining the validity of a deed of lands in that State; but in the absence of proof of the laws of that State, the question of validity would be determined by the laws of this State. This proposition goes altogether upon the presumption that the laws of the State where the land is, correspond with those of our own State relating to the same subject. The same doctrine was again recognized in *Gardiner vs. Lewis*, 7 Gill, 377." And it was accordingly assumed that, as our own laws authorize the notaries of this State to administer oaths in certain cases, the same power is conferred upon the notaries of the District of Columbia. The case in the text is also approved in *Haney vs. Marshall*, 9 Md. 212, where it was held that a deed conveying lands in another State, defectively acknowledged according to the laws of Maryland, is not admissible in evidence in the Courts of this State, without proof that it was properly acknowledged according to the laws of the State where the land is situated. The laws of the State where the land lies must govern the Courts of this State in determining the validity and operation of such a deed; but in the absence of proof of such laws, our Courts must decide these questions according to the laws of Maryland. As to the proof and construction of foreign laws, see *Gardiner vs. Lewis*, 7 Gill, 394; *Cecil Bank vs. Barry*, 20 Md. 187. But in the case of personal property, the validity of the transfer depends upon the law of the place where it is made. *Loney vs. Penniman*, 43 Md. 134.

**ASSUMPSIT.** The declaration and pleadings in this case are stated, *ante*, 453. The cause again came on for trial at the last term, (October, 1804,) when

1. *Mason*, for the defendant, contended that the plaintiff's cause of action, if he had one, arose on a demand by the plaintiff on the defendant, made in the State of South Carolina; and to that demand the defendant's 4th, 5th, 8th, 9th, 12th, 13th, 16th, 17th and 19th pleas, are a bar. He read the several papers hereinafter referred to, for the purpose of establishing this position, and prayed the Court to direct the jury, that the cause of action, if any, accrued in South Carolina.

*Harper.* The defence taken by the defendant is two-fold: 1. The Statute of Limitations of South Carolina, and 2. The general issue. Under the pleas of the Statute, it is alleged that the cause of action, if any, accrued in South Carolina. The replications traverse this fact, and state that the cause of action first accrued in Pennsylvania.

**623** Upon these replications \* issues are joined. The contract is, that the defendant should sell the land, and a deed for the land is delivered to him as an *escrow*. The sale was made by the defendant in Philadelphia, and notes were there received. The contract was consequently consummated in Philadelphia. The receipt of the notes by the defendant completed the contract. *Esp.* 128, 129. But if the cause of action arose in South Carolina on the demand for the money, then limitation does not bar, for no demand is proved to have been made until 1800.

**CHASE, Ch. J.** The contract is an inducement to the action. No cause of action accrued to the plaintiff until the notes were received by the defendant; and if there is a cause of action, it accrued in the State of Pennsylvania on the receipt of the money or notes, and the Statute of Limitations of South Carolina does not apply to the case.

2. The first bill of exceptions.—The plaintiff to support the issues on his part read in evidence to the jury an original agreement in writing, executed by the plaintiff and defendant on the 1st of March, 1803, for the admission of papers and facts as evidence in this cause, drawn up by the plaintiff himself, he and the defendant being together when it was written, both agreeing to and signing it. This agreement was, that "copies of all papers recorded in any public office of record within the United States, shall be received in evidence, on both sides, provided such copies be certified under the hand of the officer, and the seal of such office, although any other formality may be omitted, and that no objection shall be made to such copy for the want of any other formality." The agreement also made evidence seven letters from the plaintiff to the defendant; sundry papers marked 8, 9, 10; an original agreement between the

plaintiff and defendant respecting the lands to be sold by the defendant for the plaintiff, dated August 25th, 1794; an original agreement of the defendant and John Hall with Robert \* Morris and John Nicholson, relating to the sale of lands, dated November 15th, 1794; another original agreement between John Hall, in behalf of himself and Gideon Dennison, and the defendant, dated about the same time, and relating to the said sale and lands; which paper not being here, cannot be endorsed. The agreement stated that the plaintiff did not admit that he ever saw the last mentioned paper, or was informed of it, or knew of its existence or substance, till yesterday, when it was mentioned to him by the defendant. The plaintiff also agreed, that any other letters from himself to the defendant, should be received in evidence. The agreement further stated—"the defendant admits that he did sell the lands mentioned in the agreement between him and the plaintiff, to Robert Morris and John Nicholson—that they were included in the sale of lands to which the agreement between him and John Hall on the one part, and Robert Morris and John Nicholson on the other, relates, that he received payment for them in notes of the said Morris and Nicholson within a few days after the date of the agreement last mentioned, and at the rate and in the manner by that agreement stipulated; but he does not admit that the plaintiff ever made any demand of the said notes, or ever tendered to him any indemnity or counter-security according to the tenor of the aforesaid agreement between him and the plaintiff. He also admits in evidence the paper marked agreement A. But he does not admit that the said paper is in any degree connected with the aforesaid agreement between him and the plaintiff. He also admits that the papers above mentioned marked 8, 9, 10, relate to the part of the said land, which by virtue of the said agreement A, belonged to Jacob Rumph, and not to the moiety thereof, which by that agreement was the property of the plaintiff. The plaintiff admits, that before the beginning of the year 1800, the notes of Morris and Nicholson had ceased to be of any value, and that before that time the lands in question had been sold and conveyed by M. and N. He also admits in evidence a receipt from \* Garrett Cottringer, dated November 21st, 1794, a copy of which is endorsed on the aforesaid agreement between the defendant and John Hall on the one part, and M. and N. on the other."

The plaintiff further read in evidence to the jury, an original agreement between Jacob Rumph and the plaintiff, dated the 22d of August, 1794, and referred to in the above admission as the paper marked agreement A. That agreement is as follows: "State of South Carolina. Memorandum of an agreement entered into at Orangeburgh on the 22d of August, 1794, between Colonel Jacob Rumph and Robert Goodloe Harper. Colonel Rumph having surveyed and passed through the location and surveyor-general's offices,

a tract of land in the fork of Edisto, Orangeburgh district, containing two hundred and eighty thousand acres, and particularly described in the plot thereof now of record in the said offices, about the granting of which land difficulties have arisen, and doubts are entertained, it is agreed hereby between him and the said Robert Goodloe Harper, that if the latter shall be able to obtain a grant for those lands, he shall, in consideration of that service and his trouble, and also of his trouble and expenses in selling them, be entitled to one equal moiety of all the vacant lands within the said survey, and of the moneys to arise from the sale—such lands as people residing within the limits of the survey may have heretofore surveyed for the purpose of settlement or cultivation, or by way of addition to their plantations, being reserved for their use, and confirmed to them after the grant is obtained; and also such lands as David Coalter may already have surveyed in his own name within those limits, being reserved for, and in like manner conveyed to him. And it is further agreed, that all expenses hereafter to be incurred in procuring the said grant, or selling the lands, shall be borne by the said Harper, without any responsibility on the part of Col. Rumph. The net profits of the sales to be divided between them. And as there is little doubt that the said limits contain 100,000 acres of vacant land at the least, the said Harper, should an \* opportunity  
**626** offer, shall sell that quantity immediately. And to enable him to do so, Col. Rumph, as soon as the grant is obtained, shall execute conveyances for 100,000 acres, out of the survey, to such persons as the said Harper shall direct, or such greater or less quantity as on searching the offices, which the said Harper shall immediately do, may appear to be vacant, and those conveyances, should it be required, shall contain all proper clauses of warranty. After this sale, no other shall be made until the quantity of lands to be reserved shall be ascertained, after which the balance of vacant land shall either be sold, and the amount of sales equally divided between the said parties, or the lands themselves shall be divided between them by proper conveyances, in equal moieties, according to quantity and quality, which ever shall be agreeable to the parties or their representatives. In witness," &c. Signed and sealed by Rumph and Harper.

The plaintiff also read to the jury the following original power of attorney from Rumph to him, dated the 22d of August, 1794, the execution of which was admitted. "State of South Carolina. Know all men, that I, Jacob Rumph, of Orangeburgh district, in the said State, have constituted and appointed, and hereby do constitute and appoint, Robert Goodloe Harper, of Charleston, in the said State, attorney at law, my true and lawful attorney, for me and in my name and stead, to take all lawful, regular and necessary steps, for procuring and recovering a grant from the Governor of this State, in due form of law, of a certain tract of land surveyed by me in the fork



of Edisto River, Orangeburgh district, containing two hundred and eighty thousand acres more or less; and when and as soon as the said grant shall be obtained, to sell and in my name convey by proper deeds, as my attorney, all such parts of the said survey, being at this time vacant land, as he shall judge expedient and proper, in fee simple, for the best price that he can obtain, and to any persons whomsoever, and to insert into the said deeds of conveyance all proper and necessary \* clauses of warranty should it be required. And I do hereby agree to and declare myself bound **627** by all that my said attorney shall do in the premises by virtue of these presents, and engage to supply all such acts on my part as may be necessary for further giving validity to his acts therein. In witness," &c. The plaintiff also read in evidence to the jury, an original agreement between him and the defendant, dated the 25th of August, 1794, the execution of which was admitted. It is as follows: "State of South Carolina. Having this day received from Robert Goodloe Harper a conveyance from him, as attorney of Jacob Rumph, to John Hall, of Philadelphia, for one hundred and fifty thousand acres of land in the fork of Edisto, in the State of South Carolina, I do hereby certify, that the said conveyance is delivered to me as an *escrow*, to be delivered to the said John Hall, upon his paying or properly securing the purchase money, which purchase money is to be received by me for the use of the said Harper, after deducting expenses, and accounted for to him; and the said Harper also agrees for himself, and the said Rumph, that for all warranties or guaranty that the said Wade Hampton shall enter into about the said lands, they will give him a sufficient indemnity and counter-security. In witness," &c. The plaintiff then read in evidence to the jury the conveyance of 150,000 acres of the said land to John Hall, dated the 10th of September, 1794, which is admitted to be the deed referred to in the agreement of the 25th of August, 1794, as the deed delivered by the plaintiff to the defendant as an *escrow*. This deed recites the survey made by Rumph—his letter of attorney to Harper—Harper's having obtained a grant on such survey for 281,197 acres, from the then Governor of South Carolina, dated the 5th August, 1793, and his sale of 150,000 acres of it to Hall, for £750 sterling, and then goes on as follows: "Now this indenture made the 10th of September, 1794, and of American Independence the 19th, between the said Robert Goodloe Harper, for and as attorney of the said Jacob Rumph, on the one part, and the said \* John Hall on the other part—witnesseth, that the said **628** Robert Goodloe Harper, for and as attorney of the said Jacob Rumph, and in pursuance of the above mentioned power of attorney, hath granted, released and confirmed, and by these presents, doth grant, bargain, sell, release and confirm, unto the said John Hall, all that plantation, parcel or tract of land, situate in Orangeburgh district aforesaid, in the fork of Edisto, containing 150,000 acres, being the

upper or westernmost part of the said survey of 281,197 acres, with all and singular," &c. &c. "To have and to hold all and singular the said tract of 150,000 acres, with the appurtenances, in the actual possession of the said John Hall now being, by virtue of a deed of bargain and sale, for one year, from the said Robert Goodloe Harper, to him the said Hall, bearing date the day before the day of the date hereof, unto him the said John Hall, his heirs and assigns for ever, to and for his and their only and proper use. And the said Robert Goodloe Harper, for himself and his heirs," &c. "and for the said Jacob Rumph, his heirs," &c. "as his attorney, by virtue of the said power, doth," &c. Here follows a covenant, "that if the aforesaid quantity of 150,000 acres of land, of clear and undisputed title, free from all grants, conveyances, judgments, mortgages, or other incumbrances of any kind, prior to this conveyance, should not be found within the said survey according to the limits above described," that the said Harper and Rumph, and each of them, "will immediately, after such deficiency shall appear or be discovered, make it up by conveying to the said Hall, his heirs," &c. "a good, legal, and indefeasible estate, in fee simple, by proper and legal conveyances," &c. "for and of other lands in this State of equal quality with those hereby intended to be conveyed, and to the amount of such deficiency, so as to convey to and vest in the said Hall, his heirs and assigns, the said quantity of 150,000 acres of land, free from incumbrances," &c. A further covenant, that Rumph, his heirs and assigns, shall make and execute all such further acts and deeds, &c.

for the more \* perfect assuring the premises, &c. to Hall  
**629** and his heirs, &c. "In witness whereof the said parties have hereunto set their hands and seals, at Columbia, the day and year first above written, this conveyance being in consideration of the sum of £750 sterling.

ROBERT G. HARPER, [SEAL.]

Attorney for JACOB RUMPH.

Signed, sealed and delivered, in the presence of us,

H. HAMPTON, JOHN LINDSEY."

This deed was proved and recorded, &c.

The plaintiff then read in evidence to the jury the admissions of the defendant contained in the paper first mentioned, that he had sold the said 150,000 acres of the land to Robert Morris and John Nicholson of Philadelphia; and to prove that John Hall the grantee in the said deed, (so delivered to the defendant as an *escrow*,) conveyed the said lands to Morris and Nicholson, by deed bearing date on the 17th day of November, 1794, the plaintiff produced the same in evidence to the jury, as follows: "This Indenture, made the 17th day of November, 1794, between John Hall, of," &c. "and Eliza Ann his wife, of the one part, and the honorable Robert Morris of," &c. "and John Nicholson of," &c. "of the other part. Whereas," &c. (reciting the grant to Jacob Rumph, the letter of attorney from Rumph to Harper, the lease and release executed by Harper to Hall,)

and then stated that Hall and wife, in consideration of five shillings, granted to Morris and Nicholson the said tract, piece or parcel of land, containing 150,000 acres, as granted to Hall as aforesaid. The deed contained covenants that Hall had an estate in fee simple in the land, and good right to sell, &c. and also contained a warranty against former and other gifts, &c. and for further assurances, &c.

The plaintiff also produced in evidence the admissions of the defendant in the paper first stated, that he received, as the consideration for the said 150,000 acres of land, the sum of 20,000 dollars in notes of Morris and Nicholson, as specified in the agreement \* hereinafter referred to, bearing date the 13th of November, 1794, between Wade Hampton and John Hall of the one part; **630** and Morris and Nicholson of the other part; and he further read in evidence the agreement last mentioned, and the several indorsements thereon, viz. "Articles of agreement indented, made and agreed upon, the 15th day of November, 1794, between Wade Hampton of," &c. "and John Hall, of," &c. "of the one part, and the honorable Robert Morris, of," &c. "and John Nicholson of," &c. "of the other part. Witnesseth, that for the consideration hereinafter covenanted to be paid, to the said Wade Hampton and John Hall, by the said Robert Morris and John Nicholson, they the said W. Hampton and J. Hall, for themselves, their," &c. "do covenant," &c. "to and with the said Morris and Nicholson, their heirs and assigns, that they the said W. Hampton and J. Hall, or either of them, shall and will within ten days from and after the date hereof, by good and sufficient deed or deeds of conveyance and assurance in the law, with general warranty, well and sufficiently grant, convey and assure, unto and to the only proper use and behoof of them the said Morris and Nicholson, their heirs and assigns, as they, or their counsel learned in the law, shall reasonably devise, advise or require, nine hundred and four thousand and eighteen acres of land, situate in the districts of Orangeburgh, Camden, Cheraw, and Washington, in the said State of South Carolina, together with the appurtenances, free and clear of all incumbrances whatsoever. In consideration whereof, the said Morris and Nicholson do hereby covenant, promise, and agree to pay unto the said W. Hampton and J. Hall the sum or price of one shilling lawful money of Pennsylvania per acre, for each and every acre of the said lands, in the following manner, to wit: The sum of £3,750 money aforesaid, in notes, at the time of the execution of the aforesaid deeds of conveyance, and the balance or remainder in five equal annual instalments in one, two, three, four and five years thereafter, the three first instalments to be paid without interest, but the two \* last sums or instalments to bear **631** lawful interest, which is to be paid annually, and to give notes of hand of them the said Morris and Nicholson; that is to say, notes drawn by the one, and endorsed by the other of them, to the said W. Hampton and J. Hall, for said five annual instalments, payable

in manner as aforesaid. And the parties aforesaid do hereby further covenant," &c. "that whereas the lines of division of two tracts situate in Orangeburgh district, of each of which tracts a part is intended to be conveyed, to wit, a tract of 39,380 acres, whereof 20,000 acres are intended to be surveyed, and a tract of 281,197 acres, whereof 150,000 acres are intended to be conveyed, have not been run, that the said lines of division shall be run in such manner as by them the said Morris and Nicholson, or their agent, shall be directed, so as that out of the said 39,380 acre tract they, the said Morris and Nicholson; shall have the full quantity of 20,000 acres, clear of any other surveys, lying within the bounds of the said whole tract; and that out of the said 281,197 acre tract, they the said Morris and Nicholson shall have the full quantity of 150,000 acres, clear of any other surveys, lying within the bounds of the said whole tract. Further, that within eight months from and after the date thereof, actual resurveys shall be made of the whole of the aforesaid 904,018 acres of land, which is now intended to be conveyed, and that if upon such resurveys being completed, it shall appear that the lands actually conveyed to the said Morris and Nicholson shall fall short of the said quantity of 904,018 acres, they the said W. Hampton, and J. Hall, shall and do, within six months next after the same being ascertained, by like conveyances as aforesaid, convey to the said Morris and Nicholson, in lieu of such deficiency, an equal quantity of other lands, as shall be certified to the satisfaction of the said Morris and Nicholson, to be equal in quality and goodness to those falling short: But if it shall appear that the said lands overrun the said quantity of 904,018 acres, clear of all interferences whatever with other lands, then the said Morris and Nicholson shall pay the said \* Hampton and Hall for such overplus, at the same rate, in the same manner, and the same terms, as hereinbefore mentioned and appointed for the said quantity of 904,018 acres. Further, that all the necessary expenses of making such resurveys shall be equally borne and paid by the said parties hereto, each party paying one moiety thereof; but that the expenses attending the running such lines of division be solely borne and paid by the said Hampton and Hall. And further that the said Hampton and Hall shall and do within eight months from and after the date hereof, procure and furnish to the said Morris and Nicholson the following instruments of writing relating to the aforesaid lands, and which have not yet been furnished by them, to wit: "Original grant," &c. "The necessary certificates from the States Courts, &c. to shew that there are no mortgages, judgments, execution, &c. against the said Wade Hampton, whereby the title to any of the said lands can or may be affected," &c.—"and like certificates from the Federal Courts respecting mortgages, judgments, executions, &c. against all the persons through whom the titles to the aforesaid lands have come," &c. "For the true and faithful perform-

ance of all and singular the covenants and agreements herein contained, the said parties bind themselves, their heirs, &c. each unto the other, firmly by these presents, in the penal sum of £150,000 money aforesaid, to be paid by the party delinquent to the party observant. In witness," &c. Signed and sealed by Hampton, Hall, Morris and Nicholson—and thus endorsed, viz. "We do certify, that in fulfillment of the contract above mentioned, the following title papers have been received by us from Doctor John Hall," viz. "Exemplification of a grant," &c.—"Certificate Court Common Pleas, Orangeburgh district, dated 15th September, 1794, respecting John Bynum, Jacob Rumph, John Hall," &c.—"Certificate same Court, same date, respecting Wade Hampton," &c. "Account Col. Wade Hampton to John Bynum, Dr. for resurveys, &c. made in 1795, amounting to \$1,714.81. Account, Col. Wade Hampton to William Cato, Dr. for resurveys, &c. made \* in 1795 and 1796, amounting to 126l. 5s. 8d. So. Car. sterling. We also acknowledge to have **633** received of the said Doctor John Hall, \$27,647.61, being a part of the notes issued on account of this contract, amounting to the sales of 207,352 acres of the within land, which had been held as a pledge for certain purposes as expressed in the receipt for the deposit, a copy of which is annexed, as a compensation for any such deficiencies should any there appear. Witness our hands, Philadelphia, May 27, 1800." Signed and sealed by Morris and Nicholson.

Copy of the receipt above referred to: "One note dated 20th November, 1794, Nicholson to Morris, payable in four years, with interest, endorsed by Morris for 4,608 dollars. One note, same date, Morris to Nicholson," &c. The whole amounting to \$27,647.61. "Received, Philadelphia, November 21, 1794, from Wade Hampton, of South Carolina, Esq. and John Hall, of Philadelphia, Esq. the above mentioned nine notes of hand, amounting to 27,647 dollars and 61 cents principal, which I am to deliver to them, or their order, (casualties by fire and other unavoidable accidents only excepted,) in moieties—one moiety to each, whenever they shall have furnished and delivered to Robert Morris and John Nicholson, Esquires, the following instruments and documents, to wit: Original grant," &c. "Original conveyance," &c. "The necessary certificates from the State Courts," &c. "to shew that there are no mortgages, judgments, executions, &c. against the said Wade Hampton, against John Anderson, William Tate and John Hampton. And also like certificates from the Federal Courts, testifying that there are no mortgages, judgments, executions, &c. against the said Wade Hampton and John Hall, or against Robert Stark, Jun. Jacob Rumph," &c. "whereby the titles to 904,018 acres of land, or any part thereof, which by the said Wade Hampton, John Hall, and William Tate, was on the 17th instant granted and conveyed to the said Morris and Nicholson, can in any wise be affected.\* Witness my **634** hand to two receipts of the same tenor and date.

(Signed)

GARRETT COTTRINGER."

These endorsements were admitted, the agreement being the same mentioned in the paper of admissions, and remaining in the possession of the defendant. And it was also admitted, that it contracts to sell the land, for the price of which this suit is brought, and describes the same as 150,000 acres of land, intended to be conveyed out of a larger tract of 281,197 acres. The plaintiff also produced and read in evidence to the jury, another original agreement, dated the 27th of November, 1794, between Hall, Hampton, and a certain Gideon Dennison by Hall his attorney, the execution of which was admitted; and it was also admitted that this agreement in part relates to the land for the price of which this suit is brought. It was as follows: Articles of agreement indented, made and agreed upon, this 27th day of November, 1794, between Wade Hampton of," &c. "of the one part, and John Hall of," &c. "as well for himself as for and in behalf of Gideon Dennison of," &c. "of the other part. Witness, that the said parties hereto, lately made sales of divers tracts of land lying in the State of South Carolina, to Robert Morris and John Nicholson of," &c. "which said lands were conveyed to the said Morris and Nicholson on the 17th of this present month, in the following manner, to wit," &c. "the quantity of 150,000 acres, situate in Orangeburgh district, in and by one other deed of indenture also executed by the said John Hall and Eliza Ann his wife; the quantity of," &c. "in all the sales of which before mentioned lands the said Wade Hampton is interested and concerned in one-half part the amount of the same, and the said John Hall and Gideon Dennison in the other half part thereof. Now the said parties hereto, do each for himself, his heirs," &c. "mutually covenant," &c. "to and with the other party, his executors," &c. "that if any loss shall hereafter be sustained by either of the said parties by means of any deficiencies," &c. "to said lands, or any \* part thereof, or by reason or means of any other unforeseen cause relating to the said lands, or any part thereof, all such loss or costs," &c. "shall be borne and paid, the one moiety thereof by the said Hampton, his heirs," &c. "and the other moiety thereof by the said Hall and Dennison, their heirs," &c. "Further, if any benefit or profit should hereafter accrue to and be received by the said parties or either of them, for or on account of the said land, by reason of any of the said tracts overrunning the quantity for which the same were sold, such moneys shall be divided between the said parties, in the same proportion as aforesaid. For the true and faithful performance of all and singular the covenants and agreements herein contained, the said parties bind themselves, their heirs," &c. "each unto the other, firmly by these presents, in the penal sum of \$100,000, to be paid by the party delinquent to the party observant. In witness," &c. Signed and sealed by Hampton and Hall, and by Hall for Dennison. The plaintiff also produced and read the deposition of Andrew Summers, (which was admitted to be read in evidence,) as

to the value of the notes of Morris and Nicholson. It states, that in the year 1794, in the months of October and November, the notes of Morris and Nicholson were at par. In December the value in the market was something less than par, but how much the deponent could not say with accuracy. In the year 1795, January 22d, 26th, 27th, and February 4th, 13s. 4d. for 20s. of notes at 23 months. February 27th, 12s. for 20s. of notes at 22 months. April 16, 10s. 8d. for same, at 31 and 19 months. September 24th, 9s. for same, at 15 months. November 6th, 7s. 6d. for same, at 20 months. December 4th, 6s. 8d. for the same at 19 months; and December 24th, 6s. for same, at 23 months. The plaintiff further offered in evidence to the jury, to prove by their production on the 1st of March, 1803, and by their production on this trial by the defendant, as evidence in his behalf, that the three papers dated the 20th of December, 1794, and hereinafter mentioned, were at that time, and ever since have been in the \* possession of the defendant, and were by him produced and read to the jury at the time of the trial. He also 636 read to the jury a letter from the plaintiff to the defendant, and received by him, dated January 12th, 1800, viz:

Philadelphia, January 12, 1800.

"I had the pleasure yesterday, my dear sir, of receiving your letter of Nov. 26th, enclosing one to Jones and Clark, which I shall deliver to-morrow. Until I hear from them I can say nothing further in answer to that letter, except that I can now foresee nothing which ought to prevent me from attending to the professional case alluded to by you.

"I did receive your letter of Nov. 3d, before I left Baltimore to attend Congress; but as I had it not in my power to give any satisfactory answer to the only part of it which required one, till my arrival here, I postponed until that time. I then applied to the proper offices on the subject of Major Hutchinson's claim," &c. Bond was in Maryland when I came up; and did not arrive here till after my departure for Baltimore. I have not yet spoken to him on the subject of the note and mortgage. It is my intention to pay the money; but I think it will be safer for you in the hands of Jones and Clarke; and I shall therefore lodge it with them as soon as I can make it up.

"You will recollect, that in 1794 you effected a large sale of lands to Morris and Nicholson at one shilling Pennsylvania currency per acre, in their notes, payable at various periods; and that among these lands there was one tract of 150,000 acres, the half of which belonged to me. My proportion of the notes, which were at that time in full credit, amounted of course to £3,750 P. C. This sum remained undivided in your hands. Considering you in the light of a friend, in whose hands my interests would be safe, I did not question the sufficiency of the reasons which you assigned for the detention; although the deprivation of those funds brought on me

very serious embarrassments, the effects of which I still feel. They are indeed very heavy. I have supposed that \* the whole of **637** the notes derived from the general sale in question had died in your hands by the depreciation; and in that supposition I submitted patiently to what I supposed a common loss. I now owe it to candor to say, that a very different state of facts, on that head, has been suggested to me. It has been suggested to me, that the whole, or a very large part of the notes in question, was employed by you in the winter of 1794-5, in the extensive purchases which you made about that time. In this case you will perceive, that I should be entitled, in law as well as justice and fair dealing, to an account for my proportion of all that was invested at the rate at which you passed them away. I resolved not to listen to this suggestion, much less to believe it, till I should have asked you the true state of the fact. I therefore beg the favor of you to inform me, whether any, and what part of the notes arising from the general sale in question, was invested by you, at what time, and at what rate? In full confidence that your answer will be entirely satisfactory, I remain," &c.

The plaintiff, to prove that the defendant actually received from Morris and Nicholson, to whom the lands aforesaid were sold, the sum of \$4,851.67, in money, in part of the notes received from M. and N. for the sale of the lands in the year 1794, read the deposition of Joshua B. Bond. This deposition states, that the deponent, early in 1795, became the agent of the defendant in Philadelphia, for collecting money due to him in that city, and for transacting his money concerns there, and continued to act as such until the year 1803. He believed the defendant had no other agent there during that period. About the 1st February, 1795, he received from the defendant two drafts, drawn by the defendant in the deponent's favor he believes, one upon Robert Morris, and the other upon John Nicholson, each for \$4,180.50, at sixty days sight; these drafts were transmitted to the deponent by the defendant for the sole purpose of collecting \* the money for him. The drafts were accom- **638** panied by a letter from Morris and Nicholson addressed to the defendant, authorizing him to draw as he had done. The letter marked A, dated Philadelphia, Nov. 20, 1794, from M. and N. to the defendant, is exhibited, and is as follows: "In the arrangements made for the payments of the amount of our purchase of lands from you, there remains in our hands a sum of \$8,377, for which we hereby agree to pay your drafts in the following mode: Upon Robert Morris for such sums as you may find convenient, at not less than sixty days sight, to the amount of \$4,188.50, and upon John Nicholson in like manner, to the amount of \$4,188.50; and your drafts, so drawn, will be punctually paid by us respectively. It being however agreed and understood between us, that you will not pass these drafts sooner than your necessities require," &c. The



deponent states, that this is the letter, or a duplicate of the letter, which was sent to him by the defendant with the drafts. The body of the letter is in the hand-writing of R. Morris, the signature Rob. Morris is in his Mr. Morris' hand-writing, the signature John Nicholson is in his Mr. Nicholson's hand-writing, and the direction on the back of the letter is in the hand-writing of Garrett Cottringer, then clerk to Robert Morris. That the drafts were presented to M. and N. and accepted, but at maturity were both dishonored and protested for non-payment. That after much exertion, and much dunning, the deponent received at different times from John Nicholson, the sum of \$2,508.37, in part. That he took bills on London for the balance, which were dishonored and protested. That suits were brought on them, and before judgments were obtained, M. and N. became so desperate in their affairs, that nothing could be obtained from them, and that nothing was received. The deponent knew nothing of the sale of lands by the defendant to M. and N. When the defendant sent the deponent the drafts before mentioned, he also sent him, to be collected, notes drawn by Morris and endorsed by Nicholson, and drawn by the latter and endorsed by the former, \* to a very large amount, the precise sum he cannot tell, but believes to the amount of \$10,000, probably much more. **639**

These notes remained with the deponent until the latter end of the year 1795, when there being very little prospect of collecting them, or disposing of them but at a very great loss, the defendant took out of the deponent's hands many of them—the amount, &c. he does not recollect. Two of the notes thus sent to the deponent, remained in his hands until the year 1803, when he returned them to the defendant; of these two notes one of them was drawn by Morris and endorsed by Nicholson, for \$4,608, dated 20th Nov. 1794, payable twelve months after date, and the other drawn by Nicholson, and endorsed by Morris, for \$2,016.67, dated the 17th of November, 1794, payable 36 months after date. Upon this last note nothing was ever paid—the whole of it still remaining due. Upon the note for \$4,608, the deponent received from Morris, Jared Ingersoll's note for \$3,000, which last note the deponent sold for \$2,343.30, and accounted for that sum with the defendant. The balance of \$1,608 still remains due and unpaid. Upon the back of this note for \$4,608, Garrett Cottringer has thus endorsed: "Received Janry. 9, 1796, of R. Morris, \$443.25, being balance arising on a note of Jared Ingersoll's, due 20th March next: also said Ingersoll's note, dated 20th Nov. 1795, at 8 mo. due 20th July next, for \$3,000, on acct. of the within note"—by this it would seem, that both these sums were paid on that note; but that is not the case, in this there is a mistake, the first mentioned sum of \$443.25 was paid, in fact, upon another note, the property of the deponent. The paper marked B exhibited, is a bill of exchange dated Philadelphia, June 20, 1796, for \$1,805.55, drawn payable 8th October then next, by the plaintiff, in favor of

Messrs. Pragers & Co. on Joshua B. Bond, the witness. The deponent states, that it is the original draft, and was accepted by him at the request of both plaintiff and defendant. It was the defendant who induced him to accept it, and guaranteed the deponent from loss for doing so. It was accepted \* on the defendant's credit

**610** The draft was paid by the deponent. The paper marked C exhibited, is a bill of exchange drawn by the plaintiff at Philadelphia, on the 20th June, 1796, for \$1,850, on Johnson Hagood of Charleston, at three months, in favor of Joshua B. Bond. The deponent states, that this is one of the set of bills drawn by the plaintiff in his favor—the object in giving it was to raise funds to meet the deponent's acceptance for him before mentioned. It was dishonored and sent back protested, and has never been paid. The plaintiff promised payment to the deponent. It was however paid by the defendant, and the plaintiff repaid to the defendant a part of the money, which passed through the deponent's hands. The plaintiff knew, as the deponent believes, that he was the defendant's agent. Never heard the plaintiff allege or pretend at any time, when he called on him for payment of the money due on the draft, before or after the defendant had paid the deponent, that the defendant owed him money, or held in his hands any funds belonging to him. Early in 1797 the notes of M. and N. became of no value at all in the City of Philadelphia.

The defendant then read in evidence to the Court and jury, to support the issues on his part, all the papers produced and read by the plaintiff, and herein before stated, except the letter from the plaintiff to the defendant dated 12th of January, 1800. He also read in evidence an Act of the General Assembly of the State of South Carolina, passed on the 10th of May, 1794, entitled, "An Act to close the land office for and during the term of four years, under certain limitations, and for other purposes therein mentioned." The third section of that Act is as follows, viz. "And whereas since the passing an Act, entitled, An Act for establishing the mode of granting the lands now vacant, in this State, and for allowing a commutation to be received for some lands that have been granted, passed the 19th day of February, 1791, divers grants of large tracts of land have been obtained, which included one or more surveys which have not

**641** been elapsed, the \* property of others, without taking notice of or designating the same in their plots, and without obtaining the consent of the said proprietors, and without their knowledge: And whereas," &c. "Be it enacted," &c. "that the said surveys were made in the violation of the instructions given to the deputy surveyors in this State; that the said grants have been obtained contrary to the intention of the Legislature in establishing the mode of granting the lands, now vacant in this State; that the Governor must have been deceived when he signed the same; and that on its being proved in the manner before enacted, to the satisfaction of

any District Court and jury within whose jurisdiction the land lies, that such grants actually contained within their limits one or more settlements, the property of others under former surveys, without taking notice of or designating the same in their plots, and obtaining their consent, (where such consent could have been obtained,) to run the same, the Court shall declare the grants to be fraudulent, and the same shall be void to all intents and purposes." The defendant further read in evidence, the grant from the Governor of South Carolina to Jacob Rumph, dated the 5th of August, 1793, for 281,197 acres of land, (which is admitted to embrace the land, for the price of which this suit is brought,) and the plots or survey upon which that grant issued. "The State of South Carolina, to all to whom these presents shall come, greeting: Know ye, that in pursuance of an Act of the Legislature, entitled, 'An Act for establishing the mode of granting the lands now vacant in this State, and for allowing a commutation to be received for some lands that have been granted, passed the 19th of February, 1791,' we have granted, and by these present do grant unto Jacob Rumph, Esq. his heirs and assigns, a plantation or tract of land, containing two hundred and eighty-one thousand one hundred and ninety-seven acres, surveyed for him the 19th of July, 1793, situate in Orangeburgh district, in the fork between North and South Edisto Rivers, bounded," &c. "having such shape, form and marks, as are represented by a plot hereunto annexed, together with all\* woods," &c. "to have and to hold the said tract of two hundred and eighty-one thousand one hundred and ninety-seven acres of land, and all and singular," &c. "unto the said Jacob Rumph, his heirs and assigns, for ever, in free and common soccage. Given," &c. The plot is annexed, of the land surveyed 19th July, 1793, and containing 281,197 acres, for Jacob Rumph. The defendant also read in evidence the deposition of John Bynum, Esquire, surveyor-general of South Carolina. The deposition states that the deponent was applied to by Hampton, in the spring of 1795, to resurvey certain lands in the State of S. C. which had been sold in November, 1794, by Hampton, Hall and Denison, to Morris and Nicholson, and that he did undertake to resurvey part of the lands so sold, and did actually resurvey the same. That he was requested by Hampton to resurvey the tract of land granted to Rumph for 281,197 acres, but declined the undertaking. His reasons for so doing were, that he had understood that the inhabitants residing within the limits of that grant were much dissatisfied, and had expressed a determination not to permit their lines to be closed or run through or upon, nor to permit the resurvey to be made. And, as he conceived it both a difficult and laborious undertaking, even with the aid and assistance of the inhabitants, there being a very great quantity of older granted land within the said patent, and mostly in small tracts, he declined making the resurvey, and recommended Alexander Bolling Stark, as a proper person to

make the resurvey, he being acquainted with the inhabitants residing on it. The deponent is surveyor-general of the State of S. C. and was commissioned as such on the 18th of February, 1803. He does not know how much vacant land the said survey and grant contains, after making the deductions of such lands as people residing within the limits of the survey, had, before the 22d of August, 1794, surveyed for the purpose of settlement or cultivation, or by way of addition to their plantations, and such lands as David Coalter had surveyed in his own name, before that day, within the limits of

**643** \* Rumph's survey—and such lands in such survey as had been patented to others previous to the 5th of August, 1793. But from all the information which the deponent had been able to obtain from the records of the surveyor-general's office, and other sources, he is confident that the quantity of vacant land contained in the said survey, after making the aforesaid deductions, does not exceed 120,000 acres; but is of the belief that it contains 10 or 15,000 acres less than that quantity. He is induced to this belief, as well from the quantity of land covered by older surveys within the limits of the said large survey, as from an opinion that the tract of country comprised within the lines and limits of the said large survey does not contain the aggregate number of acres specified in said survey and grant. The defendant, to prove that the plaintiff was sensible of the danger that the patent granted to Rumph for the said 281,197 acres might be vacated, read to the Court and jury an agreement between the plaintiff and Rumph, dated the 13th of November, 1794, which it is admitted relates to the lands mentioned in the agreement of the 25th of August, 1794: "South Carolina. Memorandum of an agreement entered into between Col. Jacob Rumph and Robert Goodloe Harper, at Orangeburgh on the 13th of November, 1794." This agreement recites the grant to Rumph, the agreement between Rumph and the plaintiff, the sale to Hall, the delivery of the deed to the defendant, and also that Rumph did authorize David Coalter to receive £375 out of his part of the moneys to arise from the said sale, taking from Coalter a note for £150. And it was agreed between the parties—"First.—That Rumph shall relinquish to Harper all his right to the moiety of moneys to arise from the above mentioned sale, deducting first the £375 paid to David Coalter, and shall also convey to Harper all his Rumph's title, interest and estate, in the remainder of the said lands granted in the fork of Edisto, which conveyance is to be without warranty, and will extend

**644** to such lands only as were vacant at the time \* when the said grant bears date, and as are not excepted in the former agreement between the said parties. Secondly.—In consideration of the foregoing, Harper shall give Rumph good bond, with sufficient security, to indemnify him against any warrant, claim or demand, of any kind, which may hereafter be made on him on account of the above mentioned sale and conveyance, or of any other sale to be here-

after made by Harper, of any part of the said lands, and shall moreover pay Rumph £500 sterling. And Thirdly.—Harper shall make no demand on David Coalter for any part of the £375, and shall settle that matter with Col. Hampton, so as to prevent him from making any such demand. Col. Rumph is to allow Coalter's note for £150 in part payment of the above mentioned £500. And the said £500 is not to be paid or demanded should the grant be set aside by the Legislature or Courts of this State—but in that case Col. Rumph is to be indemnified in manner aforesaid." This agreement was signed and sealed by Rumph and Harper. The defendant also read in evidence three papers, dated the 20th December, 1794, all in the hand-writing of the plaintiff, except the signature, Wade Hampton, to two of them, as a subscribing witness, which is in the hand-writing of the defendant; two of which three papers relate to the agreement of the 13th of November, 1794, for purchasing the interest of Rumph in the 150,000 acres of land, for the price of which this suit is brought, and the other being a paper which the plaintiff required Rumph to sign and give to him the plaintiff. These papers are exhibited; the first is a bond from the plaintiff to Rumph, dated 20th December, 1794, and conditioned for the payment of £350 money of S. C. on the first June then next—signed and sealed by the plaintiff, and witnessed by the defendant. The second paper is dated Orange County, December 20, 1794, and is as follows: "Robert Goodloe Harper having executed and delivered to me a bond of this date, conditioned for the payment of £350 sterling on or before the 1st day of June next, I do hereby acknowledge that no part \* of the said bond is to be demanded or to become due till the grant made to me for 281,197 acres of land, in the fork of Edisto, shall have been properly and sufficiently resurveyed and confirmed; and that if the said grant should be set aside by the Legislature, or declared void by the Courts of justice, the said bond is to become void. Witness my hand and seal the day and place above mentioned." But it was neither signed nor sealed. The third paper is a bond from the plaintiff, with a blank for the name of another person to Rumph, dated the 20th of December, 1794, for carrying into effect the agreement between Harper and Rumph of the 13th of November, 1794, hereinbefore stated—signed and sealed by Harper, and witnessed by Hampton. Which proposed purchase by the plaintiff from Rumph, mentioned in the last mentioned four papers, was however never made complete or carried into effect. The defendant also read an order from the plaintiff upon the defendant, dated the 9th of May, 1795, which the defendant accepted and paid: "Sir, please to deliver to Dr. John Hall or his order, one thousand dollars, in notes of Morris and Nicholson, payable two years after date, and place to the account of my part of lands sold to them." The defendant also read several letters to him from the plaintiff, viz: One dated Charleston, January 9, 1795—In which the plaintiff stated, that he

had given a bond, with Dr. Ramsay as his security, and he was anxious to make such arrangements as would place him beyond the danger of being called on; and that could the funds belonging to him in the defendant's hands be appropriated immediately, the business might easily be settled; but particular circumstances preventing that, all that he could do for the Doctor's security, was to request, that in case any accident should happen to the plaintiff, the defendant would apply so much as should be sufficient out of those funds to the discharge of the bond in question. Another letter, dated Charleston, January 9, 1795; and that part of it having any relation to the question in dispute is as follows: "The suddenness  
**646** of my departure has thrown me back \* in some pecuniary arrangements, which it is of importance to my feelings to make. Mr. Hagood, my agent in Charleston, who is charged with these affairs, may perhaps have need of your assistance. I have directed him to call on you with an assurance that if 2 or £300 should be necessary for my affairs, and conveniently in your power, your aid might be relied on." The depositions of Johnson Hagood and David Ramsay, were also read by the defendant. They stated, that nothing was received of the defendant in consequence of the preceding letters. Also another letter, dated Philadelphia, March 28, 1795. The part of this letter which seems to be material is as follows: "Morris and Nicholson are still low, and it is doubtful when they will rise, if ever. I myself have no doubt that they will. Their land scheme goes on, though slowly, and the ultimate success of it is very problematical. It is impossible almost to give any opinion on the subject, or even to form one." Also another letter, dated Philadelphia, August 9, 1797. In this letter the plaintiff stated, that he had been called on by Mr. Bond, relative to some money transactions between him and the defendant, and which he had supposed had been settled by the sale of property in Charleston. He expressed his regret at not being able at that time to pay the money which he owed the defendant, or even the balance due on Bond's affair, and says, "the resource of Morris and Nicholson's notes has entirely failed." Also another letter dated the 13th of August, 1797, inclosing a mortgage executed by the plaintiff to the defendant, of a tract of land, &c. also the mortgage above alluded to, dated 13th August, 1797, of 650 acres of land, at Lawrens' Court-house, in the County of Lawrens, in S. Co. purchased of Samuel Saxon, to secure the payment of \$922.80 with interest from the 12th of March then last, for which a note is given in twelve months from the date. Also a note of hand of the same date for \$922.80 with interest from the 28th March then last, payable to the defendant 12 months after date. Also another letter dated Baltimore, Sep-  
**647** tember 26, 1799, in which the \* plaintiff mentioned his intention of fixing his residence in Baltimore, &c. that he had an application for his place at Lawrens, which Mr. Hagood was author-

ized to sell, securing as a prompt payment the sum due to the defendant, and that should it not be paid in that way, his profession, he trusted, would soon furnish him with other resources. The defendant then read the affidavit of the plaintiff in this cause, filed by him, on the 13th of October, 1802, viz: Robert Goodloe Harper, the plaintiff in the above action, being duly sworn, did depose and say, that on or about the 25th of August, 1794, Wade Hampton, the defendant in the said action, did sign, execute and deliver to this deponent, a writing bearing date on that day, and in the following words and figures, viz: [Here follows the agreement between Hampton and Harper.] "And the deponent further saith, that the said writing is now in his possession; that the name W. Hampton thereto subscribed, is the signature of the defendant. That the defendant did make sale of the said land to the said John Hall, at the rate and price of one shilling, Pennsylvania currency, an acre, equal to one shilling current money of Maryland, an acre, which payment was made by the said Hall to the defendant in promissory notes of Robert Morris and John Nicholson of Philadelphia, and was received by the defendant some time in the months of September, October or November, 1794; that the notes were payable at different periods, and at the time of their being so received by the defendant, were in such credit, and of such value, as to pass currently in payments and purchases in the City of Philadelphia, and elsewhere within the United States, at their nominal amount, with a discount of the legal interest six per centum, till the time of their becoming due. That the sum so received by the defendant for the 150,000 acres of land, mentioned in the said writing, was £7,500 Pennsylvania currency, equal to the same sum of current money of Maryland. That one-half of the said land belonged to this deponent, by virtue of an agreement in writing between him and Jacob Rumph, in the \* above mentioned writing named; the other half being the 648 right and property of the said Rumph, from whom this deponent hath understood and believes, that it was afterwards purchased by the defendant. That this deponent's demand against the defendant, consequently extended only to one-half the above mentioned notes, or £3,750 current money, with interest from the time when the said payment was received by the defendant as above stated. And that this deponent hath not, directly or indirectly, received from the defendant any of the said notes, or any satisfaction, compensation or value therefor, of any kind, except the sum of one thousand dollars, part of the notes which he assigned to Hall for a valuable consideration some time in the summer of the year 1795, and for which he gave Hall an order on the defendant, the fate of which this deponent does not know, but which he considers as an extinguishment of his demand against the defendant to the extent of \$1,000 of the notes. And this deponent further saith, that the defendant resides without the limits of this State, to wit, in the State of South Caro-

lina; and that this deponent doth not know or believe that the defendant is seised or possessed of any real or personal property within this State.”

Whereupon the defendant prayed the opinion of the Court, and their direction to the jury, that upon the whole of the evidence given in this cause, the plaintiff is not entitled to recover upon either of the counts in the declaration.

*Johnson*, for the defendant, contended that the evidence was not sufficient to authorize the jury to give a verdict for the plaintiff. That if there was any cause of action at all it depended on a special agreement with the defendant, signed by the plaintiff for himself and Col. Rumph. The plaintiff is then to be viewed in one of two capacities, in neither of which can he sustain the action. 1. He is either a partner with Col. Rumph, or 2. He is agent; and 3. Upon the whole evidence there is no cause of action.

**649** \* 1. It does not appear that Col. Rumph's interest is assigned. He gives the plaintiff one-half if he sells the land. The money was to be raised, and each was mutually interested in the sale, and having a mutual interest, one cannot sue without the other. *Gil. L. E.* 186. Where there is a partnership demand, all the partners should join, for the contract and undertaking is joint; and if one partner only brings the action, the defendant may take advantage of it at the trial, and non-suit the plaintiff. *Esp.* 117; 2 *T. R.* 282.

2. If the plaintiff is the agent of Col. Rumph, the action cannot be supported. The contract did not preclude Col. Rumph from carrying into effect any sale made by the plaintiff. A factor may support an action for the price of goods, which as factor he has sold; for the promise shall be presumed to be made to him. *Esp.* 107. But there is a distinction in law between factors and other agents. Factors may sue in their own name; other agents cannot. *Esp.* 109. The contract between the plaintiff and defendant cannot alter the nature of Col. Rumph's right. This contract, says the defendant, is to account with the plaintiff. It refers to the contract with Rumph, and to the letter of attorney.

3. There is no cause of action anywhere. There is a condition precedent in the agreement between the plaintiff and defendant. Certain things are to be done by the former before a demand can be made by him. Counter-security was to be given by him to the defendant for all warranties and guarantees that the defendant might enter into. The plaintiff had no right to call on the defendant until he had given the counter-security, and consequently not having done so, he cannot sustain this action. It would be compelling the defendant to resort to a suit to compel a counter-security. They are not mutual and independent covenants—but the covenant to pay the money depended upon the giving the counter-security,



and this not being given, the defendant had a right to retain the money until it should be given.

\* *Mason*, on the same side. It appears that the legal title to the land was in Col. Rumph, and the equitable title to the money in the plaintiff as the attorney of Rumph. The power of attorney does not authorize the plaintiff to make the contract. He was not to appropriate the funds to his own use. If the plaintiff has made an unauthorized contract, it is void, and can give him no cause of action. He has secured the payment to himself, which he was not authorized to do. It is a sound and true principle of law, not to be controverted, that agreements in *pari materia* are to be all taken together, and to be considered as one agreement. The grant to Col. Rumph was issued subsequent to August, 1794, but antedated to 1793. This is evident from the contract between the plaintiff and Rumph in August, 1794, which states that the grant was not then obtained. The Act of the Legislature of South Carolina, passed in 1794, evidently takes in this grant. The first section of that law declares that there should be no future grants for above 500 acres—and that the land office should be shut up as to grants above that quantity for 4 years. The defendant was not bound to account for the money or notes received, until the counter-security was given. The contract intended to give a future security upon the sale, if guarantees were entered into. It was a friendly act on the part of the defendant in selling the plaintiff's land, and he was to derive no benefit or advantage from it, and if he incurred a responsibility in the sale, he should be counter-secured, and until he is he should not part with the funds in his hands. The intended agreement between the plaintiff and Rumph in November, 1794, shews that they had fears as to the grant's being vacated. It does appear that the plaintiff has no cause of action, and therefore cannot recover.

*Key*, for the plaintiff: The plaintiff, by the agreement with Col. Rumph, is entitled to one-half of the land, or if sold, to one-half of the amount of the sales. A Court of equity would compel a conveyance \* from Rumph, to the plaintiff for one-half of the land. The plaintiff's interest was a tenancy in common with Rumph in the land, and he might sell one-half, independently of Rumph. The deed to Hall contains a general warranty, and nothing has been done by the defendant requiring a counter-security. By the agreement between the plaintiff and defendant, the defendant is to pay to the plaintiff the amount of the purchase money. This Court is not competent to declare a grant for land in South Carolina, void. The defendant sold to M. and N. lands of his own, granted at the same time the land was granted to Rumph. He knew or supposed the grants were valid—since if he had known or supposed they were void, it is to be presumed he would not have sold the lands so granted. In the agreement between the defendant and

Hall, and Morris and Nicholson, there are no covenants creating any liability on the part of the defendant on account of the lands sold for the plaintiff. M. and N. were to run the line of division, and if they never run that line, the defendant says he is never to pay the plaintiff. The resurveys were to be made by M. and N.—and running the line of division is a resurvey. Notes were retained by M. and N. under the agreement to answer the deficiencies, &c. Their release shows they have no claim on that account. They acknowledge they have received compensation for all deficiencies, &c. The defendant has not shown that he gave the plaintiff any notice of his having entered into any guarantees, &c. or made himself liable or answerable in any way on account of the lands sold by him for the plaintiff. There is no guarantee in force against the defendant upon which an action can now or ever could have been brought. To excuse himself from paying the money, three things must be shown by the defendant: What was the counter-security to be given for? If the money is withheld it is incumbent on the defendant to show what guarantee has been entered into by him, so as to justify his not paying it over. But there is nothing shown proving a guarantee.

**652** Papers have been produced, which the \* defendant pretends prove his liability to be called on, viz. The deed from the plaintiff to Hall; the deed from Hall and wife to M. and N.; and the agreement between the defendant, Hall and Dennison. These instruments of writing are all to be taken together, and there is no warranty in any of them to prove any guarantee whereby the plaintiff is bound. It is not pretended M. and N. ever run the lines of division, and the defendant was not liable to any expenses until the lines were run. Suppose the covenant did contain a liability on the part of the defendant—that liability has been discharged under the release from M. and N. it not being shown that M. and N. had parted with their interest, or that they had not a right to release. The release to Hall enures to the benefit of all the parties. If M. and N. had made sale of the lands, such sale did not affect the release. It was not a covenant real, but it was a personal covenant, and no deed has been shown from M. and N. of their having entered into any covenants. And supposing they had entered into any, they would be personal covenants only, and did not of course enure to the benefit of the defendant; and the discharge of M. and N. is valid, and is a complete release to Hall and the defendant. There is no liability, and could not be any, in the deed from the plaintiff to Hall, so as to operate upon the defendant. Under the articles of the 27th November, 1794, all the parties agreed to gain or lose in equal proportions upon the whole sales, and if there had been a loss, and the whole loss had been on the 150,000, there was no liability on the part of the defendant.

As to the other objections, the plaintiff does not stand as a partner with Col. Rumph. There is no such thing as partners in land; that term is applicable to traders only.

*Johnson.* It is immaterial whether they were partners or tenants in common, the plaintiff cannot support his action. 1 *Com. Dig.* 12; *Co. Litt. s.* 315, 316.

\* *Harper.* On the general issue the defendant objects to the plaintiff's right to recover, on four grounds: **653**

1. That the plaintiff is in this case an agent and cannot recover in his own name, but ought to sue in the name of Col. Rumph. 1 *Esp.* 109.

2. That this is a joint claim or partnership between the plaintiff and Col. Rumph, and a separate action cannot be maintained on it. *Esp.* 117.

3. That the counts in the declaration vary from the agreement in two respects—1st. The counts speak of payment of money only, and the agreement speaks of payment or securing of payment. 2d. The count says, that the plaintiff was to indemnify, and the agreement states that the plaintiff and Rumph should indemnify. That these variances between the count and the evidence are fatal. *Esp.* 130, 139.

4. The deed mentioned in the agreement, and given in evidence, is not valid; therefore the defendant is not liable.

1. To the first objection, there are three answers. 1st. An agent, where he contracts in his own name, may maintain an action, because the promise is \* intended to be made to him. *Esp.* 107; *Bull. N. P.* 130. 2d. The plaintiff is entitled to one moiety in his own right, and not as agent, and for that he may recover. 3d. Here is an express promise to pay the whole to the plaintiff, who therefore has the legal right to recover the whole; and as to the moiety is accountable to Rumph as a trustee. **654**

2. To the second objection, that there is a partnership or joint claim, it is answered. 1st. That it is not a joint claim, but separate rights to distinct moieties.—In which case each may sue separately. *Esp.* 117. 2d. Here is an express promise to one to account with him singly; therefore he is not a partner with the other, but a trustee for him as to the moiety, and has the legal right to recover the whole. It is like the case of a surviving partner, and the executor of the deceased partner. *Esp.* 117; *Martyn and Crump, Salk.* 444.

3. To the third objection, the answer is, 1st. That a variance, to be fatal, must be in a part of the agreement material to be set forth. For it is a maxim that surplusage never can vitiate, and it cannot be error to allege that defectively, which need not be alleged at all. *Esp.* 140; *Bradburn vs. Bradburn, Cro. Jac.* 149; *Doug.* 15; 1 *T. R.* 447; 7 *Co.* 9; *Cro. Eliz.* 88; 3 *Burr.* 1586. It may be objected, that the contract is entire, and must be proved as laid—*Gwinnet vs. Phillips et al.* 3 *T. R.* 643.—And it may be admitted. This means only such parts of the paper as make an essential part of the ground of action. But if there be distinct contracts in the same paper, as

here, or distinct covenants in the same deed, none but those material to the support of the action ought to be set out, or if set out need be proved. *Doug.* 665. \* It is answered, secondly, that the

**655** variance itself is immaterial, and therefore does not vitiate. *Esp.* 129, 130. The reason why there must be no variance is, that the defendant ought to have notice of the demand against him. Every substantial important part of the agreement, every material stipulation, must be set out in the count, otherwise the suit would be on one contract, and the recovery on another. *Esp.* 129, 130; 1 *T. R.* 134, 447; *Bull.* 145; *Esp.* 138, 139; 1 *Str.* 22, 697; 2 *Str.* 806, 817; *Ld. Ray.* 533; 3 *Wils.* 1; 2 *Str.* 793; 1 *Raym.* 450.

The case of *Weaver vs. Boroughs*, 1 *Str.* 648, has been overruled. *Bull.* 139, 140; *Doug.* 651. As to what a count for money had and received will lie for, see *Cowp.* 179; 2 *Blk. Rep.* 828; *Cowp.* 371, 376; *Evans' Essays*, 2; 2 *Blk. Rep.* 1269. As to what constitutes a condition precedent, see *Cro. Eliz.* 888; 7 *Co.* 9, 10; 1 *Lutw.* 245; *Esp.* 131.

To show that the release from M. and N. to Hall, enures to the benefit of all the parties, he cited *Co. Litt.* 232; *Esp.* 297.

*Mason*, cited as applicable to the last objection. *Doug.* 685, 689; 4 *T. R.* 761; 8 *T. R.* 366, and 1 *East*, 619.

\* *Martin*, (Attorney-General,) for the plaintiff. In this case **658** it appears that a valuable property was sold by the defendant, for the plaintiff, ten years ago, for what was at that time considered as specie; for it will not be denied but that *Morris* and *Nicholson* were then solvent, and their notes considered equal to specie. The defendant does not defend himself upon the merits of the case. He has pleaded the Acts of Limitations of three different States; and fortunately for the plaintiff, these pleas have been got rid of. The defendant now says, the plaintiff's action is misconceived, and although it be true that he has received the money, yet there is a covenant entered into for which there is no indemnity given. But he does not show the engagements so by him entered into, or that he has been called on to comply with any one of them, or that there is any likelihood he ever will be called on. Yet he \* with-

**659** holds the money, although he has never given notice to the plaintiff of any such stipulations, or called on him for indemnities. And he now sets up a private agreement, not recorded, and to which the plaintiff is not a party, or ever saw it till since this action was brought, for the purpose of preventing the plaintiff's recovery.

The first objection is that the action is misconceived—Whether the land was sold or not, the plaintiff was entitled to one-half as tenant in common with *Col. Rumph*; and if it was sold, he was entitled to one-half of the purchase money. The plaintiff is answerable to *Rumph*, and the defendant is answerable to the plaintiff, and to him alone. If there are joint holders of a ship, one of them cannot sell more than his own share. He may bring *trover* in his own name

for his share. They are considered as tenants in common, and not as partners. They cannot bring a joint suit if they sell their parts of the ship; but each must sue for his own share, even if there is a joint sale. So in the sale of lands, unless there is a bond for the money or a joint contract. This is the reason of the case in *Espinasse* respecting the timber sold—each had an interest in the land, and of course in the timber. So for the use and occupation of lands of several persons, each are to sue for his particular interest in the rent. It is different from the case of partners—there all must join, though they have agreed among themselves as to the proportion each is to have. If two persons are in partnership, and one of them entrusts an agent to sell certain of the partnership goods—if the agent sells, the partner who entrusted the goods has the right of action against the agent. So in the case of an agent authorizing another to sell a horse, if the horse is sold, the agent has the right of action. It is true the principal may forbid the payment to the agent. Col. Rumph could not join the plaintiff in this action. The contract was made with the plaintiff, and he alone could bring the action. The defendant is to pay the whole sum to the plaintiff, unless Rumph forbids the payment of his moiety. 3 *Bac. Ab.* 202, 206.

The inducement for the defendant's taking the deed to Hall, was the large sale of lands that he and Hall, with Dennison were engaged in with M. and N. and it is presumed they made a very advantageous contract, for they sold nearly a million of acres, and the defendant is said to be worth at least £10,000 sterling per annum, and the withholding the money of the plaintiff, and speculating upon it, has \* been in some measure, no doubt, the means of his large pos-  
sessions. By the agreement between the defendant and Hall **663** with M. and N. the defendant and Hall, or either of them, were to execute deeds. Hall had the legal estate in the plaintiff's land, and he conveyed by a proper deed. The lines of division were to be run, and the resurveys to be made, within eight months, of the whole of the 904,018 acres of land. The defendant had no right to make the covenant, in this agreement, to bind the plaintiff further than it respected the tract of 150,000 acres. He had no right to connect it with the 904,018 acres. The resurvey could not apply to the tract of 150,000 acres; for running the line would ascertain the quantity, which line was to be run by M. and N. The expense of running the line was to be paid by the defendant and Hall, and the running was to be in eight months. But admitting the 150,000 acres were to be resurveyed, M. and N. were first to fix on the running the divisional line within eight months, and if they did not do it within that time, Hall and the defendant were exonerated from resurveying the land—and M. and N. never have, to this day, either in person or by their agents, run the line, or applied to have it run, or fixed upon the running of it. The defendant therefore has been at no expense in running the line, and the guarantee is freed in this particular. The

expenses are not a condition precedent; for by the agreement all the expenses are to be first deducted out of the purchase money; and if any have been sustained, they can be deducted now. A deficiency of land then, was the only thing that could possibly affect the plaintiff. There was a pledge for the papers, and an estimate made of about what deficiency there would be in the land—not of the 150,000 acres, but of the whole 904,018 acres, and a certain sum retained as a sufficient compensation. Here then was a complete discharge of all guarantees or warranties for any engagement entered into by the agreement between the defendant and Hall and M. and N. But it is said, what could Hall do by which \* the plaintiff could have

**664** been benefited? Hall stood in the place of the plaintiff, and if M. and N. ceased to have any claim against Hall, and the defendant, on account of the land, neither the defendant nor Hall could claim any thing of the plaintiff. The amount of notes retained by M. and N. were to them equal to specie—the depreciation of their notes was nothing to them. Although M. and N. may have sold the land, it is not shown that they warranted or defended it; and even suppose they did, the covenant by Hall and the defendant were not real covenants, and did not go with the land; they were only personal covenants, upon which a personal action alone could be brought. An assignment of the covenants could only warrant a suit in the name of the grantee of M. and N. But there being a full acquittance, no assignment could be made—on the face of the agreement it is shown that it is cancelled. The deed from Hall and wife to M. and N. of September, 1794, contains a general warranty; this is a covenant real, not by the defendant, but by Hall. The defendant has not entered into a single guaranty or warranty on account of the plaintiff's law. We admit that Hall might have been called on to make up the deficiency of land if there was any; but by the acquittance this guarantee has been released, and in a Court of equity, (if there was a suit on the warranty,) M. and N. might be enjoined by their discharge—a full compensation having been accepted by them in full of all deficiency, &c. We admit that if M. and N. have warranted and defended in their deed for the sale of the land, that in an action of *warrantio*, &c. Hall might be made answerable; and the guaranty in the deed from the plaintiff binds the plaintiff and Rumph to him as fully as his warranty binds him to M. and N. There is no agreement by the plaintiff to indemnify Hall, further than the covenant in the deed to him. The agreement between the defendant, Hall and Dennison, of the 27th November, 1794, executed ten days after the sale of the land to M. and N. and the whole transaction was closed. It is not an agreement made upon the \* sale of the land of the plaintiff to

**665** Hall—but relates to the sale to M. and N. There is in it no warranty or guaranty which is real, or which was authorized by the plaintiff to be entered into. But it is an agreement respecting

904,018 acres, one-half of which the defendant was interested in and Hall and Dennison was interested in the other half. It was done to show the real interest each party had in the sale in case of death, &c. The plaintiff had no notice of this agreement, and never heard of it until since this suit was brought. It cannot possibly affect him. It relates altogether to deficiency, and as to any deficiency there has been a complete discharge given by M. and N. The defendant is bound to account for the value of the notes at the time he received them—not for what is now, or was the value at the time the action was brought. He cannot set up the pretence that the plaintiff had no right to sell the land, or that the patent was liable to be vacated. Under none of these pretences can he pocket the money he has received—It would be opening the door for every agent to cheat and defraud his employer.

\* CHASE, Ch. J. (a) In forming an opinion on the ques- 671  
tions which have arisen in this case, and which have been so  
amply and ably discussed, the Court have taken into view principally  
the agreement of the 22d of August, 1794, between the plaintiff and  
Col. Rumph; the power of attorney from Rumph to the plaintiff of  
the same date; the agreement of the 25th of August, 1794, between  
the defendant and the plaintiff, for himself and Col. Rumph, and  
the contract of the 15th of November, 1794, between Wade Hamp-  
ton, John Hall, and Morris and Nicholson; the admission of facts in  
the case, and the acknowledgment of Morris and Nicholson to John  
Hall, dated the 27th of May, 1800.

The Court consider the testimony which has been adduced as  
applicable to the ninth count for money had and received, and are of  
opinion that it was not necessary to join Col. Rumph in this action.

The plaintiff, in virtue of the first agreement between him and  
and Col. Rumph, acquired an equitable interest in a moiety of the  
land, and by the power from Col. Rumph to sell and convey the  
whole land, &c. had a right to receive the whole sum from the de-  
fendant, under his agreement with the plaintiff, dated the 25th of  
August, 1794, the one-half in his own right, the other half as attor-  
ney for Col. Rumph, to whom he is accountable—the power to sell  
and convey involving in it the right to receive the money, which the  
defendant cannot controvert in derogation of his own agreement.  
The land was sold to Morris and Nicholson, through the agency and  
intervention of Hall; and the defendant, by entering into the con-  
tract with Morris and Nicholson, became responsible to the plaintiff for  
what he received on account of the 150,000 acres of land.

\* The Court are of opinion, that the defendant and Hall 672  
did enter into engagements with Morris and Nicholson respect-

(a) The Chief Judge observed that Mr. DONE, not hearing all the argu-  
ments of counsel, did not give any opinion, but that Mr. SPRIGG and himself  
occurred upon all the points submitted by the counsel.

ing the 150,000 acres of land, and that he, with Hall, was bound to have the whole 904,018 acres of land resurveyed, and that it was necessary to have the 150,000 acres resurveyed for the purpose of excluding elder surveys, and ascertaining the vacant land, before the line of division could be run; and that the liability of the defendant to account for deficiency did not cease before the 27th of May, 1800, when Morris and Nicholson accepted the \$27,647 in notes, as an equivalent for the deficiency of the said lands sold them.

It now remains for the Court to express their opinion on the agreement between the plaintiff and defendant.

In expounding contracts the Court has adopted the principle recognized and established by the Courts in England—That the sense and meaning of the parties, to be collected from the contract and the nature of the transaction, is to be regarded; and that it does not depend on any technical words or precise form, whether a covenant is mutual and independent, concurrent, or in the nature of a condition precedent. This principle is founded in justice, is agreeable to common sense, and does not infringe any rule of decision.

In deciding the cases which have recently occurred, (*Morrison and Galloway*, and *Lloyd and Gray*,) the Court had this principle in view, and intended to be governed by it. In both those cases there were a variety of covenants stipulated to be performed, some by the plaintiff, and some by the defendant. In the case of *Morrison vs. Galloway*, if the Court had decided the covenants on the part of the plaintiff to be in nature of a condition precedent, he would have been deprived of the benefit of his contract by the non-fulfilment of a stipulation of trivial importance, and the Court thought the defendant could be compensated in damages; and so in the case of *Gray vs. Lloyd*, the overseer would have lost his year's wages by not performing some stipulation on his part from whence little  
**673** damage would have accrued to the defendant.

If the agreement is to be considered, without resorting to any extraneous matter explanatory of it, then the plaintiff cannot recover, without proving that the defendant did receive money from Hall, to whom the deed was delivered; but in the opinion of the Court it must be considered with the agreement between the defendant and Hall with Morris and Nicholson.

It was certainly contemplated by the plaintiff and defendant that the defendant should or might be obliged, in order to sell the land, to enter into warranties or guaranties, and that it was reasonable if he did that he should be counter-secured or indemnified.

Warranty cannot be taken in the confined sense contended for; because being a covenant real the defendant could not enter into it, as the legal estate would vest in Hall on the delivery of the deed to him. It must be taken in a more comprehensive sense, and to signify any engagement by which a liability was created on the part of the defendant.



It is the opinion of the Court that it was the sense and meaning of the parties that the giving the counter-security was to precede or take place at the time of paying the notes of Morris and Nicholson to the plaintiff; and that he cannot support this action unless he can prove that he did give or tender such security; or unless he can prove that the defendant did convert the said notes of Morris and Nicholson to his own use; and in such case, it is the opinion of the Court, that the defendant is accountable for the value at the time of such conversion. The defendant excepted.

3. *Mason*, for the defendant, suggested to the Court, before the signing of the preceding bill of exceptions, that the release from M. and N. was not under seal, and he doubted therefore how far it would operate.

CHASE, Ch. J. That question was not made by the counsel in arguing the case, nor did it occur to the \* Court. The Court are not satisfied, and wish to hear an argument upon the **674** subject. The Court also wish to know what effect the release would have in an action of covenant by M. and N. against Hall and Hampton, for deficiency or non-performance, &c.

*Harper*. Where an action arises immediately on the covenant, or other deed, under seal, accord and satisfaction, without deed, under seal, is no plea. But if it arises mediately, and is for damages on account of something not done which the defendant had covenanted to do, accord and satisfaction without deed, is a good plea.—6 *Coke*, 44; *Bac. Abr. tit. Accord and Satisfaction*; *Cro. Jac.* 254; 2 *Wils.* 86, 376.

*Mason, contra*. The release must be under seal, and must have the same formalities as the original covenant. This Court, in the case of *Somerville vs. Hebb*, at May, 1803, decided, that an agreement not under seal, endorsed on the bond, should not be received to prove that the defendant had under that agreement tendered tobacco in satisfaction of the debt. But if the release in this case operated as to the then existing breaches, it could not operate to affect any subsequent breaches. *Esp.* 307, 308; 1 *East*, 619. This is not a release of all covenants,—it is only a release of breaches actually sustained at the time, and cannot operate as a release of subsequent breaches which might accrue. The resurveys have not been made, and it is not certain that the covenants to resurvey the lands were broken or not—and if not broken, the release does not release them. But if the lands are hereafter resurveyed, and a deficiency is ascertained six months after the breaches accrue, accord and satisfaction does not take it in—the release could not affect or release the deficiency thereafter to accrue. It amounts to an agreement between parties to substitute one thing for another. This

cannot be done except by deed under seal. *Rogers vs. Payne*, 2 Wils. 376.

**675** \* CHASE, Ch. J. It seems to be agreed, that to dissolve a covenant, something of equal solemnity must be shown. If the breach has accrued, accord and satisfaction is a good plea—But not for breaches not yet taken place.

Three things were to be performed by Hall and the defendant.—The title papers were to be produced—the resurvey was to be made, and the deficiency of land, if any, was to be made up. One of these covenants has been complied with, the other two have not. The paper releasing from all deficiency, and acknowledging satisfaction for any deficiency, is evidence to the jury that there was a deficiency, and the party agreed to accept the money in full discharge for all such deficiency.

Had Morris and Nicholson brought their action of covenant, they could have recovered damages for the deficiency, and in order to recover damages, deficiency must be shown; and had they filed a bill in Chancery for a specific performance, a Court of equity would say, having received full compensation the bill must be dismissed.

**676** \* If the jury find there was a deficiency, and that Morris and Nicholson have accepted a compensation, this paper will be sufficient to discharge the parties.

The Court consider their former opinion given as the proper opinion in the case.

4. The second bill of exceptions.—The plaintiff then prayed the opinion of the Court, and their direction to the jury, that inasmuch as it has been proved that the defendant in this action received into his possession, in November, 1794, the notes of Morris and Nicholson, for which this action is brought, the jury may and ought to presume that he disposed of them for his own benefit for their full value, at the time of such receipt, unless he can now show when and in what manner he disposed of them.

*Harper.* Under the opinion which the Court has given, the issue lies affirmatively upon the plaintiff to prove that the defendant converted the notes to his own benefit. The plaintiff has proved that the defendant received the notes, and it is incumbent on the defendant now to show what he has done with them; for a man who has it in his power to tell the truth, but refuses to do so, is to take all the consequences. The defendant has had full notice to produce the notes. If they were in his possession or power, or to say what has become of them.

The case of the jewel reported in *Salkeld*, and cited in *Butler*, 43, is a very strong one in point. Nothing more is necessary than to trace the property to the possession of another; and being so traced, he is bound to produce it, or account for it according to its value

at the time when it came to his hands. No principle of law is better established.

*Mason and Johnson, contra. Key and Martin, in reply.*

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court cannot give the direction prayed for by the plaintiff.

\* The Court are of opinion that the notes of Morris and Nicholson were to remain in the hands of the defendant as a **679** deposit, until the engagement of the defendant under the contract of the 15th of November, 1794, ceased, unless the plaintiff and Col. Rumph, in the intermediate time between the 15th of November, 1794, and the 27th of May, 1800, had given, or offered to give, counter-security to the defendant to indemnify him against his liability under his engagement to Morris and Nicholson. The plaintiff excepted.

5. The third bill of exceptions.—The plaintiff then prayed the opinion of the Court, and their direction to the jury, that the stipulation on the part of the plaintiff for himself and Rumph, contained in the agreement of August the 25th, 1794, is not a condition precedent to the stipulations on the part of the defendant in such agreement contained; but that the stipulations on the part of the defendant, and of the plaintiff for himself and Rumph, are to be taken as mutual and independent covenants.

*Harper.* To constitute a condition precedent, it must appear that the thing to be done on one side, was the consideration of the thing to be done on the other. This makes the covenants dependent. But if the two things depend, each of them, on a distinct consideration of its own, then the covenants are mutual and independent. This principle will be found to govern all the cases. *Nichols vs. Raynbred*, Hob. 88; (this case is cited and admitted in 1 *Lord Raym.* 665;) 1 *Roll. Ab.* 414, 415; *Lea vs. Excelby*, Cro. Eliz. 888; *Smith vs. Shelden*, 2 Mod. 33; *French vs. Trewin*, 1 *Ld. Raym.* 124; *Thorpe vs. Thorpe*, 1 *Ld. Raym.* 665; (this case cited and admitted in 6 *T. R.* 572;) *Blackwell vs. Nash*, 1 *Stra.* 535; 1 *Roll. Ab.* 415, pl. 10; *Peters vs. Opie*, 1 Vent. 177; *Lancashire vs. Killingworth*, 1 *Ld. Raym.* 686; *Collins vs. Gibbs*, 2 Burr. 899; *Kingston vs. Preston*, 2 Doug. 689; *Jones vs. Barkley*, 2 Doug. 684; *Goodison vs. Nunn*, 4 *T. R.* 761; *Glazebrook vs. Woodrow*, 8 *T. R.* 366; *Heard vs. Wadham*, 1 East, 619; *Cole vs. Shallett*, 4 Lev. 41; *Boone vs. Eyre*, 1 H. Blk. 273, (n;) *Duke of St. Albans vs. Shore*, 1 H. Blk. 270, 278; *Campbell vs. Jones*, 6 *T. R.* 570; *Morrison vs. Galloway*, (third bill of exception,) in this Court; *Kingston vs. Preston*, 2 Doug. 689; *Glazebrook vs. Woodrow*, 8 *T. R.* 366; *Hotham vs. The East India Company*, 1 *T. R.* 645.

CHASE, Ch. J. The Court are of opinion, that the stipulation on the part of the plaintiff and Jacob Rumph, is a condition precedent;

and that the defendant was not compellable to deliver or to pay over to the plaintiff the notes of Morris and Nicholson so received by him, until the plaintiff gave, or offered to give him counter-security, to indemnify him against his liability under his engagement to Morris and Nicholson. The plaintiff excepted.

**682** \* 6. The fourth bill of exceptions.—The plaintiff further prayed the opinion of the Court, &c. that in consequence of the agreement entered into between Morris and Nicholson, and Hall and Hampton, dated the 15th of November, 1794, the lines of division by which M. and N. should elect to have the 150,000 acres of land run, to be divided from the residue of the survey of which they were to be a part, were necessary to be run by M. and N. or their agent, or under their direction, before the 150,000 acres were to be resurveyed by Hall and Hampton; and that as the resurvey of the whole 904,018 acres were to be made within eight months after the date of the contract, unless M. and N. or their agent, did direct how the lines of division should be run, within eight months after the date of agreement, the engagement that the 904,018 acres should be resurveyed, as far as relates to the 150,000 acres, was dispensed with by M. and N. and their right to recover damages against Hall and Hampton for not resurveying the 150,000 acres under the contract, was by them, M. and N. lost and ceased.

CHASE, Ch. J. The Court are of opinion, that the defendant and Hall were bound by the contract of the 15th of November, 1794, to have the whole 904,018 acres resurveyed; and that it was necessary to have the 150,000 acres resurveyed for the purpose of excluding elder surveys, and ascertaining the vacant land; and that it was necessary to make the resurveys before the line of division could be run under the direction of Morris and Nicholson. The plaintiff excepted.

7. The fifth bill of exceptions.—The plaintiff further prayed the opinion of the Court, &c. that in consequence of the covenants entered into by Hall and Hampton, with Morris and Nicholson, by the contract dated the 15th of November, 1794, the defendant had no right to withhold from the plaintiff the notes received for the sale of the 150,000 acres of land, any longer than eight months after the date of that contract, unless they made a resurvey by the expiration of that time of the 150,000 acres, or unless on such resurvey a deficiency was found in the 150,000 acres of land sold on the account of the plaintiff and Rumph.

CHASE, Ch. J. The Court are of opinion, that the defendant had a right to withhold the notes until the 27th of May, 1800, the said engagement being an existing engagement until that time, although the resurvey above referred to was not made within eight months from the date of the contract. The plaintiff excepted.

\* 8. The plaintiff further prayed the opinion of the Court, &c. **684**  
That under the contract of Hall and Hampton, with Morris and Nicholson, on the 15th of November, 1795, it was incumbent on, and the duty of Hall and Hampton, in virtue of the covenants entered into, to make the resurvey of the 904,018 acres of land, within eight months from the date of said contract; and that it was not incumbent on the plaintiff and Rumph, or either of them, to cause the 150,000 acres of their land, included in the sale to and contract with M. and N. to be resurveyed, unless notice was given to the plaintiff or Rumph, or either of them, of the said contract, in time to be able to resurvey the same; and that if Hall and the defendant failed to give such notice to resurvey the same within eight months as stipulated, and failed to make the resurvey of the 150,000 acres within the time stipulated, that they could not, after the expiration of that time, withhold from the plaintiff his proportion of the money or notes received for the 150,000 acres of land.

CHASE, Ch. J. The Court are of opinion, that it was incumbent on the defendant to give notice to Rumph and the plaintiff, or one of them, of the contract of the 15th of November, 1794, within eight months from the date of that contract, and at such time within the eight months that Rumph and the plaintiff might have caused a resurvey to have been made of the 150,000 acres of land, within the time limited for making the same by the contract, and in order that the counter-security might have been given by Rumph and the plaintiff, to indemnify the defendant against his liability to Morris and Nicholson, under the contract.

The Court are also of opinion, that the notice, and the time of giving the same, are facts to be decided by the jury upon the evidence in the case.

\* 9. The defendant then prayed the opinion of the Court, and their direction to the jury, that by the contract of the **685**  
25th of August, 1794, the notes of Morris and Nicholson, received by the defendant for the sale of the lands in the declaration mentioned, were to remain in the hands of the defendant as a deposit until the engagements of the defendant, under the contract of the 15th of November, 1794, ceased, unless the plaintiff and Col. Rumph in the intermediate time between the 15th of November, 1794, and the 27th of May, 1800, had given or offered to give counter-security to the defendant, to indemnify him against his liabilities under his engagement to M. and N. on the 15th of November, 1794. That during the time from the 15th of November, 1794, until the 27th of May, 1800, it was the duty of the defendant to have held these notes for the plaintiff, and if, having so kept the notes, they became of no value, it would be the loss of the plaintiff. That if at any time between the 15th of November, 1794, and the 27th of May, 1800, the defendant had sold the notes for less than their nominal value, or

and that the defendant was not compellable to deliver or to pay over to the plaintiff the notes of Morris and Nicholson so received by him, until the plaintiff gave, or offered to give him counter-security, to indemnify him against his liability under his engagement to Morris and Nicholson. The plaintiff excepted.

**682** \* 6. The fourth bill of exceptions.—The plaintiff further prayed the opinion of the Court, &c. that in consequence of the agreement entered into between Morris and Nicholson, and Hall and Hampton, dated the 15th of November, 1794, the lines of division by which M. and N. should elect to have the 150,000 acres of land run, to be divided from the residue of the survey of which they were to be a part, were necessary to be run by M. and N. or their agent, or under their direction, before the 150,000 acres were to be resurveyed by Hall and Hampton; and that as the resurvey of the whole 904,018 acres were to be made within eight months after the date of the contract, unless M. and N. or their agent, did direct how the lines of division should be run, within eight months after the date of agreement, the engagement that the 904,018 acres should be resurveyed, as far as relates to the 150,000 acres, was dispensed with by M. and N. and their right to recover damages against Hall and Hampton for not resurveying the 150,000 acres under the contract, was by them, M. and N. lost and ceased.

CHASE, Ch. J. The Court are of opinion, that the defendant and Hall were bound by the contract of the 15th of November, 1794, to have the whole 904,018 acres resurveyed; and that it was necessary to have the 150,000 acres resurveyed for the purpose of excluding elder surveys, and ascertaining the vacant land; and that it was necessary to make the resurveys before the line of division could be run under the direction of Morris and Nicholson. The plaintiff excepted.

7. The fifth bill of exceptions.—The plaintiff further prayed the opinion of the Court, &c. that in consequence of the covenants entered into by Hall and Hampton, with Morris and Nicholson, by the contract dated the 15th of November, 1794, the defendant had no right to withhold from the plaintiff the notes received for the sale of the 150,000 acres of land, any longer than eight months after the date of that contract, unless they made a resurvey by the expiration of that time of the 150,000 acres, or unless on such resurvey a deficiency was found in the 150,000 acres of land sold on the account of the plaintiff and Rumph.

CHASE, Ch. J. The Court are of opinion, that the defendant had a right to withhold the notes until the 27th of May, 1800, the said engagement being an existing engagement until that time, although the resurvey above referred to was not made within eight months from the date of the contract. The plaintiff excepted.

\* 8. The plaintiff further prayed the opinion of the Court, &c. That under the contract of Hall and Hampton, with Morris and Nicholson, on the 15th of November, 1795, it was incumbent on, and the duty of Hall and Hampton, in virtue of the covenants entered into, to make the resurvey of the 904,018 acres of land, within eight months from the date of said contract; and that it was not incumbent on the plaintiff and Rumph, or either of them, to cause the 150,000 acres of their land, included in the sale to and contract with M. and N. to be resurveyed, unless notice was given to the plaintiff or Rumph, or either of them, of the said contract, in time to be able to resurvey the same; and that if Hall and the defendant failed to give such notice to resurvey the same within eight months as stipulated, and failed to make the resurvey of the 150,000 acres within the time stipulated, that they could not, after the expiration of that time, withhold from the plaintiff his proportion of the money or notes received for the 150,000 acres of land. **684**

CHASE, Ch. J. The Court are of opinion, that it was incumbent on the defendant to give notice to Rumph and the plaintiff, or one of them, of the contract of the 15th of November, 1794, within eight months from the date of that contract, and at such time within the eight months that Rumph and the plaintiff might have caused a resurvey to have been made of the 150,000 acres of land, within the time limited for making the same by the contract, and in order that the counter-security might have been given by Rumph and the plaintiff, to indemnify the defendant against his liability to Morris and Nicholson, under the contract.

The Court are also of opinion, that the notice, and the time of giving the same, are facts to be decided by the jury upon the evidence in the case.

\* 9. The defendant then prayed the opinion of the Court, and their direction to the jury, that by the contract of the 25th of August, 1794, the notes of Morris and Nicholson, received by the defendant for the sale of the lands in the declaration mentioned, were to remain in the hands of the defendant as a deposit until the engagements of the defendant, under the contract of the 15th of November, 1794, ceased, unless the plaintiff and Col. Rumph in the intermediate time between the 15th of November, 1794, and the 27th of May, 1800, had given or offered to give counter-security to the defendant, to indemnify him against his liabilities under his engagement to M. and N. on the 15th of November, 1794. That during the time from the 15th of November, 1794, until the 27th of May, 1800, it was the duty of the defendant to have held these notes for the plaintiff, and if, having so kept the notes, they became of no value, it would be the loss of the plaintiff. That if at any time between the 15th of November, 1794, and the 27th of May, 1800, the defendant had sold the notes for less than their nominal value, or **685**

had appropriated the same to his own use, and the notes had at this time risen in value, so as to be worth what they expressed upon the face of them, with interest thereon, the plaintiff would have a right to recover of the defendant the present value of the notes; but that if the notes at this time, and at the time of bringing this action, are and were of no value, that then the plaintiff might elect to affirm any sale of them before made by the defendant, if such sale had been made, and under the count in the declaration for money had and received, recover from the defendant the price for which he had actually sold the notes, or the value of the notes when the defendant converted them to his own use, if he did not convert them: But that, in the event of the plaintiff's making such election, it was incumbent upon him to prove to the jury an actual sale of the notes by the defendant, or an actual conversion of them to his own use, and the price for which the same sold, if they were sold, or

**686** \* the actual value of them when they were sold by the defendant, or converted to his own use.

CHASE, Ch. J. The Court gave the direction to the jury as prayed by the defendant.

A juror was again withdrawn by consent of the parties, and the cause continued until this term, when it again came on for trial.

10. Leave by consent of the parties had been given at the last term to the plaintiff and defendant to take out commissions to sundry places for the purpose of getting testimony, with a proviso that if the commissions were not returned at the present term, it should be no cause for the continuance of the case until the next term. The plaintiff's commissions were returned with testimony; and the question was, whether the defendant was entitled to a continuance f

CHASE, Ch. J. The defendant has a right to a continuance where the plaintiff is about to use testimony obtained under a commission returned at the present term. See *Norwood vs. Owings*, ante 296.

The plaintiff withdrew his commissions, and the jury were sworn.

*Harper.* The opinions given by the Court in this case at the trial at the last term, have reduced the case to a narrow compass, and the only questions for the jury to decide are—

1. If the defendant did not give the plaintiff and Rumph, or one of them, notice within eight months to make the resurveys, &c. then the jury are to find the whole amount of the notes of M. and N. at the time the defendant received them; but

2. If the jury find that the notice was given, then, if the defendant has appropriated the notes, or any of them, the jury are to find for the plaintiff the value of the notes at the time of such appropriation.



own names and referred to *Russell vs. Baker*, ante, 71; *Gilbert vs. Lee*, 4 H. & McH. 487; *Hodgson vs. Dexter*, 1 Cranch, 345; 1 Salk. 96; *McDonough vs. Templeman*, ante, 156; 1 T. R. 674. Here the deed is signed "Robert G. Harper, attorney for Jacob Rumph," and the counsel for the defendant say it should be "Jacob Rumph, by Robert G. Harper, his attorney." Where is the difference? The signification is precisely the same. There is no particular form necessary. In *Wilks vs. Back*, 2 East, 142, it is signed "Mathias Wilks," [L. S.] "For James Browne, Mathias Wilks," [L. S.] The Court said it was immaterial whether the attorney put his name first or last—that there was no particular form of words to be used, provided it was done for the principal.

*Pinkney*, in reply, said that with respect to the Proprietary leases, it has not been shown that any judicial decision has taken place upon any of them. It may be that the Courts have permitted \* them to be read for the purpose of quieting possessions. The Lord Proprietary did not grant as an ordinary individual—His agents were not attorneys particularly authorized for the special purpose of leasing his manors. They had large and extensive powers. A question, similar to the one now before the Court, was argued in this Court many years ago, and probably decided. The name of the case in which the question arose is not recollected, but if found it might assist the Court in the present question (a.)

(a) The following case is probably the one alluded to by Mr. Pinkney.

*Smith's Lessee vs. Perry*. General Court, October Term, 1788. Ejectment for a tract of land lying in Charles County, called Morris' Discovery. Verdict for the defendant, subject to the opinion of the Court on the following point saved: The plaintiff showed a title in fee simple in himself to the land in question. The defendant, to prove the title in the lands out of the plaintiff, and vested in himself in fee simple, produced a deed dated the 16th of August, 1770, stated to be made "by and between Joseph Hanson Harrison of Charles County," &c. "of the one part, and Thomas Perry of the said county," &c. "of the other part," reciting that a certain John Smith, of the county aforesaid, did, on the 1st day of September, 1767, execute a power of attorney to the said J. H. Harrison, constituting and appointing the said Harrison his true and lawful attorney, to sell and convey in fee simple, all that messuage, &c. and parcel of land, lying and being in Durham Parish, in the county aforesaid, relation to the said power of attorney being had, may more fully and at large appear;" and that the said Harrison, for and in consideration of the sum of £42 current money to him in hand paid, did in virtue of the said power of attorney, give and grant, &c. unto the said Perry and his heirs, the land mentioned in the declaration in this cause. This deed was signed, sealed and delivered by Harrison, in his own name alone; and as "attorney in fact for Smith," was acknowledged on the 16th of August, 1770, and on the 12th of December, 1770, duly recorded. The defendant also produced the power of attorney executed on the 1st of September, 1767, by Smith, constituting Harrison, his attorney for him and his name, and to his use, to lease or sell all that tract of land called Morris' Discovery, &c. The power of attorney was proved by the two subscribing witnesses on the — of June, 1774, before two justices of the peace for

The defendant then offered in evidence to the jury the circumstance that no evidence in this cause was offered to the jury that either M. and N. or any other person claiming under them, ever were, after the 15th of November, 1794, in the actual possession of the 150,000 acres of land, for the price of which this suit is brought, or of any part thereof, or ever visited or saw the same, or any part thereof. And then prayed the Court for their opinion and direction to the jury, that the deed from the plaintiff to John Hall, of the 10th of September, 1794, is inoperative in point of law. That the contract of the 15th of November, 1794, between the defendant and Hall of the one part, and Morris and Nicholson of the other part, which covenants that "Hall and Hampton, or either of them, shall by good and sufficient deed or deeds of conveyance and assurance in the law, with general warranty, well and sufficiently grant, convey, and assure the said lands to the said Morris and Nicholson, and their heirs," has not been complied with by the deed from Hall and wife to M. and N. for the 150,000 acres of land, for the price of which this suit is brought. That this liability created by the contract of the 15th of November, 1794, upon the defendant and Hall still exists, and is not done away by the receipt of M. and N. of the 27th of May, 1800.

*Pinkney*, for the defendant. There can be no doubt of the invalidity of the deed. It is executed under a power of attorney from Rumph. and is stated to be executed by the plaintiff, in his own name, for Rumph, and not in the name of Rumph, by the plaintiff as his attorney. It is a rule of law that powers should be strictly pursued.

**690** \* *Harper*. The plaintiff offers to prove by the agreement itself, and other circumstances, that it is the original held by M. and N. and the jury, and not the Court, are to judge whether or not it is the original, given up by M. and N.

CHASE, Ch. J. The Court are to decide on the competency of evidence, and not on the effect of it.

*Harper*, after offering the evidence as hereinbefore mentioned by way of addition to the former statement of facts, contended that the deed was not properly executed because in the name of the attorney and not in the name of the principal. He cited, *White vs. Cuyler*, 6 T. R. 176; 9 Co. 75, 76; 2 Raym. 1418; *Wilks vs. Black*, 2 East, 142; 3 Bac. Ab. 409; 4 T. R. 764, 5.

Rumph and the plaintiff by this suit affirm the sale and would be forever barred from taking advantage of the defective conveyance. 1 Powell, 315; 2 Vernon, 151; 2 Atk. 19, 20; 2 Powell, 34-36; 2 P Wms. 199; 3 Ib. 190.

*Martin*, (Attorney-General,) for the plaintiff, said that the leases of the Proprietary's reserved lands were made by his agent in their

own names and referred to *Russell vs. Baker*, ante, 71; *Gilbert vs. Lee*, 4 H. & McH. 487; *Hodgson vs. Dexter*, 1 Cranch, 345; 1 Salk. 96; *McDonough vs. Templeman*, ante, 156; 1 T. R. 674. Here the deed is signed "Robert G. Harper, attorney for Jacob Rumph," and the counsel for the defendant say it should be "Jacob Rumph, by Robert G. Harper, his attorney." Where is the difference? The signification is precisely the same. There is no particular form necessary. In *Wilks vs. Back*, 2 East, 142, it is signed "Mathias Wilks," [L. S.] "For James Browne, Mathias Wilks," [L. S.] The Court said it was immaterial whether the attorney put his name first or last—that there was no particular form of words to be used, provided it was done for the principal.

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CHASE, Ch. J. (DONE, J. absent. SPRIGG, J. concurred.) Upon the statement of facts which are contained in the several exceptions which have already been taken in this case to the opinions of the Court, and the additional facts now stated by the counsel for the defendant and plaintiff respectively, the counsel for the defendant have prayed the Court to direct the jury in the following manner.

First.—That the deed from Robert Goodloe Harper to John Hall of the 10th of September, 1794, is inoperative in point of law.

Secondly.—That the contract of the 15th of November, 1794, between Wade Hampton and John Hall, of the one part, and Robert Morris and John Nicholson, of the other part, which covenants that Hall and Hampton, or either of them, shall by good and sufficient deed or deeds of conveyance and assurance in the law, with general warranty, well and sufficiently grant, convey and assure, the said lands to Morris and Nicholson, and their heirs, has not been complied with by the deed from John Hall and wife to Robert Morris and John Nicholson, for the 150,000 acres of land for the price of which this suit is brought.

Thirdly.—That the said liability created by the said contract upon Wade Hampton and John Hall exists, and is not done away by the receipt of Robert Morris and John Nicholson of the 27th of May, 1800.

The Court in forming their opinion on the several questions which have been referred to them, have adverted to and considered the cases which have been cited, and the able and ingenious arguments which have been urged by the counsel in the discussion of these questions, with that attention they deserve, \* during the short  
**709** interval which could be so appropriated since the rising of the Court on Saturday. To make a good and valid deed to transfer lands in this State, the deed must be executed by the grantor, or by his attorney empowered for that purpose. If it is made by attorney, the authority derived from the principal must be pursued, and the deed must be in the name of the principal. The attorney, under and by virtue of the power to him, acquires no right to, or interest in the lands, and therefore in his own name cannot convey any.

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Charles County, and recorded amongst the records of the said county on the 15th of June, 1774. It was admitted that the land mentioned in the power of attorney, and in the deed, and the land in question, was one and the same. The question submitted to the Court was, whether the deed and power of attorney constituted a good and sufficient conveyance in law, so as to vest the title in the land, transferred by the deed and power of attorney. If the Court were of opinion that they did, then judgment was to be entered for the defendant. But if the Court should be of a contrary opinion, then there was to be judgment for the plaintiff for possession and costs.

*T. Stone*, for the plaintiff.

*J. Hall*, for the defendant.

The Court. (HARRISON, Ch. J. and HANSON, J.) gave judgment for the plaintiff on the point saved.

*Combe's Case*, 9 Co. 76, which is the first case on the subject, was a surrender of copyhold lands, by attorneys empowered by the tenant to make the surrender for him and in his name. The surrender is made of copyhold lands, by delivering a rod, or other symbol, to the steward of the manor, without any deed or other writing. So livery of seisin is made by delivery of a twig or turf on the land, which is the evidence of the transmutation of the possession from the feoffer to the feoffee, and no writing is required. These cases are distinguishable from a lease or deed. Upon recurring to the power of attorney from Jacob Rumph to Robert Goodloe Harper, it appears he was empowered to sell the lands, and to convey them in the name of Jacob Rumph as his attorney. The deed in the granting part is in the following words: "Robert G. Harper, for and as attorney of the said Jacob Rumph, and in pursuance of the above mentioned power of attorney, hath granted, released and confirmed, and doth grant," &c. and the deed is signed and sealed by Robert G. Harper, attorney for Jacob Rumph. The question is, whether this deed is valid and operative to pass the lands to John Hall? The Court are of opinion it is not; inasmuch as the authority has not been pursued, it being the deed of the attorney and not of the principal, not being in his name in the granting part. This case is exactly similar to the case of *Martha Frontin vs. Small, Raymond*, 1418. In that case she sets forth the agreement in the declaration, and declared that she, for and in the name and as attorney \* for James Frontin, demised; and the Court, on demurrer to the declaration, determined that the lease was void, because 710 it was not made in the name of James Frontin, whose house it was—and that the defendant was not liable to pay the rent. In the case of *Wilks and another vs. Back*, 2 East, 142, the doctrine in *Combe's Case*, (the second resolution,) and *Frontin vs. Small*, is acceded to by the Court, that the attorney must execute the deed in the name of the principal, and not in his own name. In both those cases the Court decided that the deed must be in the name of the principal, and that if in the name of the attorney it is void. In the case in 2 East, the only question was as to the signature. Browne was named as an obligor in the bond, and Wilks was empowered to sign, seal and deliver the bond for him. He did sign, seal, and deliver the bond for Browne, but in signing, the attorney put his own name first—Wilks for Browne; and the Court determined it was the signature of Browne, and the manner of placing the names made no difference—which was the only question before the Court. And Judge Lawrence said, it was not like the case in *Raymond's Report*, where the attorney demised to the defendant in her own name, which she could not do, for no estate could pass from her. As to the laws of South Carolina governing this question.—No doubt the laws of South Carolina must govern the Court in determining on the validity and operation of this deed, if they are different from the laws of this State; but no

proof has been adduced to prove that the laws of South Carolina will make this a good and valid deed—and without proof, the jury cannot find what the law of South Carolina is. The circumstances stated by the plaintiff are not evidence to warrant the jury in finding what the law of South Carolina is in relation to this subject. The question has arisen incidentally in an action for money had and received, and the Court must decide it according to the laws of this State; and are of opinion it must be considered as a void and inoperative deed, according to the laws of South Carolina as to any question arising on it in this case.

**711** \* As to the second question respecting the defendant's liability under the contract of the 15th of November, 1794. The Court are of opinion, that as the deed from the plaintiff to John Hall is not valid to pass the lands to him, the defendant is responsible to Morris and Nicholson under the covenant in the contract that Hall or Hampton should convey and assure the land to them by a good and sufficient deed; and that the receipt of the 27th of May, 1800, endorsed on the contract only, exempted the defendant from his responsibility as to any deficiency of land which might have appeared on the resurvey; the deposit being retained by Morris and Nicholson as a compensation for such deficiency. But the Court are also of opinion, that if the jury should find, that the contract of the 15th of November, 1794, with the endorsements thereon, produced and read in evidence, was the original agreement between the parties, and that the same was delivered up by Morris and Nicholson to the defendant, at the time of giving the receipt, or if the jury should find that there were two or more parts of the agreement executed by the parties at the time, and the Court are of opinion that the agreement itself affords *prima facie* evidence that there were more than one, there being stipulations contained in it to be performed by each party, and that the one now produced was the part delivered to Morris and Nicholson, that in such case the defendant was discharged from all liability under the contract from the time the same was delivered up.

The Chief Judge observed, that as to the case of *Hodgson vs. Dexter*, the Court suppose it was decided upon the principle, that whenever an agent for the government enters into a contract for the government, he is not answerable in his own name, unless it is stipulated in the contract that he shall be personally liable. In the case of *M'Donough vs. Templeman*, the opinion of this Court was given on this ground; that Templeman, being an agent for a private company, unless he had a power of attorney to authorize his acts, he was personally liable. The Court made a distinction \* be-  
**712** tween public and private agents. The plaintiff excepted.

*Martin*, (Attorney-General,) suggested that the Court had taken no notice of the Proprietary leases.

CHASE, Ch. J. said, there had never been any decision upon the Proprietary leases, that he knew of; and until the question came before the Court upon any of those leases, they would give no opinion on them.

12. The seventh bill of exceptions. The plaintiff then prayed the Court for their opinion and direction to the jury, that if the jury are of opinion from the evidence in the cause, that Morris and Nicholson, and those claiming under them, have been satisfied with and never objected to the validity and operation of the deed from the plaintiff, as attorney of Rumph, to Hall, or to the deed from Hall and wife to Morris and Nicholson; and that neither the plaintiff nor Rumph have, at any time since the execution thereof, ever set up any claim to the lands, or any part thereby conveyed; and that no demand or claim has been made on the defendant, under his contract of the 15th of November, 1794, that then the defendant cannot avail himself of any objection to the validity of the deeds, set up by himself during the trial of the cause, to prevent payment over of the money by him received to the plaintiff, unless he gave notice to the plaintiff or Rumph, before the institution of this suit, that the said deeds were invalid and inoperative in law.

\* CHASE, Ch. J. The Court refuse to direct the jury agreeably to the prayer of the plaintiff. The plaintiff excepted. **713**

13. The eighth bill of exceptions. The plaintiff, in addition to the preceding statements, also gave in evidence to the jury, that at the time when the contract between Morris and Nicholson, and Hall and the defendant, was executed in Philadelphia, the plaintiff was resident in Charleston, South Carolina, and continued there until long after the tenth day from the date of that contract; and that Rumph was also at that time living and residing at Orangeburgh, and that Orangeburgh is 720 miles from the City of Philadelphia; and that Charleston is distant from Philadelphia 763 miles; and that the defendant remained in Philadelphia until the 27th of November, 1794. That Hall was also residing in Philadelphia at the time when the said articles of agreement were entered into, and on the said 27th of November, 1794. That Morris and Nicholson were at the City of Philadelphia at the time when the said contract was entered into, and remained there until the expiration of ten days and upwards.

The defendant then offered evidence to the jury, that the plaintiff on the 20th of August, 1794, for some time before, and for some years next after, was a lawyer by profession, and a practitioner in the Courts of the State of South Carolina.

The plaintiff then prayed the opinion of the Court, and their direction to the jury, that supposing the covenant entered into by the defendant and Hall, on the 15th of November, 1794, in these words: "that for the consideration hereinafter covenanted to be

paid to the said Wade Hampton and John Hall, by the said Robert Morris and John Nicholson, they the said Wade Hampton and John Hall, for themselves, their heirs, executors and administrators, do covenant, promise and agree, to and with the said Robert Morris and John Nicholson, their heirs and assigns, that they the said Wade Hampton and John Hall, or either of them, shall and will, within ten days from and after the date hereof, \* by **714** good and sufficient deed or deeds of conveyance and assurance in the law, with general warranty, well and sufficiently grant, convey, and assure unto, and to the only proper use and behoof of them, the said Robert Morris and John Nicholson, their heirs and assigns, as they, or their counsel learned in the law, shall reasonably devise, advise or require, 904,018 acres of land, situate in the districts of Orangeburgh, Camden, Cheraw and Washington, in the said State of South Carolina, together with the appurtenances, free and clear of all incumbrances whatsoever," to be in force and outstanding, and to bind the defendant for the making, within ten days, a good title for the 150,000 acres of land, to Morris and Nicholson—Yet the same cannot be set up in bar to the plaintiff's claim in this case, unless within ten days after entering into that covenant, notice thereof was given to the plaintiff or Rumph, so that one of them might be enabled to convey and perfect, within ten days, the title of the lands so sold, in Morris and Nicholson, and thereby to prevent a breach of the said covenant.

**715** CHASE, Ch. J. The Court are of opinion that it was necessary that the defendant, or Hall, or Morris and Nicholson, should have given notice to the plaintiff, or Jacob Rumph, of the covenant contained in the contract of the 12th of November, 1794, within ten days from the execution thereof; and the Court are also of opinion, that the facts stated in this case are competent and sufficient evidence for the jury to presume and find, that the plaintiff in this cause had notice, within ten days from the execution of that contract, of the covenant specified therein, and herein referred to.

*Martin*, (Attorney-General,) observed, that none but an angel on the wings of the wind could give notice in ten days at such a distance.

CHASE, Ch. J. informed the attorney-general, that he had a right to take an exception to the opinion of the Court, but that he had no right to make any observations which tended to reflect on the Court, or to induce by-standers to believe the Court had been guilty of an absurdity. That Mr. Attorney had been too much in the habit of such conduct, and he was, so far as related to himself, determined to submit to it no longer; that as long as he held a seat on the Bench, (and he did not know how long that might be,) he was resolved to have a proper respect paid to the Court. He could not



conceive what the distance of South Carolina from Philadelphia had to do with the opinion of the Court.

\* *Harper*. We wish to precede the prayer, upon which the opinion of the Court has just been given, with a few additional facts. He then stated the facts as they appear preceding the prayer last made. 716

CHASE, Ch. J. confessed that he had been under a mistake; that in forming his opinion he had supposed the plaintiff was in Philadelphia when the contract was entered into. This will give a different complexion to the case—and the Court withdraw the opinion just given.

The Court wish to hear counsel upon the point of notice; whether the plaintiff, having placed himself out of the reach of notice, he was entitled to it? And whether it was necessary at all for the defendant to cause the plaintiff to have notice of the covenant, as the defective deed upon which the covenant was entered into had been delivered by the plaintiff?

\* CHASE, Ch. J. The opinion of the Court was given before on the supposition that it was incumbent on the defendant to give notice of the guaranties by him entered into, before he could claim counter-indemnity from the plaintiff. I had supposed that the plaintiff was in Philadelphia at the time the contract was entered into between Hall and the defendant with Morris and Nicholson; in this I was mistaken. 718

The question now is, whether the defendant was bound to give the plaintiff notice in ten days to avail himself of the counter-indemnity and security which the plaintiff had engaged to give by his contract with the defendant.

The defendant supposed the deed from the plaintiff to Hall, and which was delivered over to Morris and Nicholson, was a good and effectual deed; in that he was mistaken. The contract between the plaintiff and \* the defendant was predicated upon the idea of a good and valid deed; so was the contract with Morris and Nicholson; and the defendant acted as a friend, and gratuitously, and in the same manner as he acted for himself in the sale of his own lands. He was empowered to enter into contracts to assure the land. The deed given to Morris and Nicholson to convey the land, not being a good and valid conveyance, if the Court were to decide that under this part of the contract the defendant was bound to give notice which was impossible, the defendant would be stripped of the advantage of the engagement entered into by the plaintiff to counter-secure and indemnify him. The plaintiff might have given these counter-securities and indemnities before the contract between the defendant and Morris and Nicholson was entered into. If the 719

Court were to say the notice was necessary to be given within ten days, it would preclude the defendant from the benefit of claiming his counter-security and indemnity. The Court therefore refused to give the direction as prayed. The plaintiff excepted.

14. The ninth bill of exceptions. The plaintiff, in addition, &c. also offered in evidence to the jury, that during the trial of this cause, to wit, on this 21st of May, 1805, he tendered to the defendant a bond of indemnity, bearing date the 21st of May, 1805, with Charles Carroll, of Carrollton, Esquire, security, in the penalty of \$25,000, [which was not objected to as to form,] and that the bond was then refused by the defendant. He further offered in evidence, that Charles Carroll, of Carrollton, the obligor in the said bond mentioned, is sufficient and able to pay the said sum of \$25,000; and then prayed the opinion of the Court, and their direction to the jury, that if they believe the facts so offered in evidence, then the said tender and refusal of said bond does operate to prevent the defendant in this action from protecting himself from the plaintiff's demand by the covenant for conveyance and assurance contained in the indenture of the 15th of November, 1794.

**721** \* CHASE, Ch. J. The Court are of opinion, and so direct the jury, that the tender of the bond to the defendant in the manner stated, and the refusal of it by the defendant, ought not in any manner to influence or affect the decision of this case, nor the verdict of the jury thereon. The plaintiff excepted. Verdict and judgment for the defendant.

The plaintiff appealed to the Court of Appeals; and the case was argued in that Court at June Term, 1808, by *Martin* and *Key*, for the appellant, and the appellant in proper person; and by *Johnson*, (Attorney-General,) and *Magruder*, for the appellee, before TILGHMAN, NICHOLSON and GANTT, JJ. It was continued under *curia ad vult.* and in consequence of the death of Judge TILGHMAN, until December Term, 1809, when the appellant dismissed his appeal.

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#### COURT OF APPEALS, JUNE TERM, 1805.

##### MARTIN vs. THE STATE. CLAYPOLE vs. MARTIN.

An attachment of contempt against a juror for non-attendance, is not an action for which the attorney-general can receive a fee for appearing on behalf of the State.

Where an indictment is found on a presentment in a criminal case, and the party presented and indicted submits the case to the Court, the attorney-general is not entitled to a fee of 200 lbs. of tobacco or 25s.

THE first of these cases was a writ of error to the General Court. It was for the removal of a judgment rendered in that Court, on an

\* 11. The sixth bill of exceptions. The plaintiff, in addition to the statement contained in the several bills of exceptions **687** herein before set forth (a) offered evidence to the jury to prove, that the deed from him to John Hall, of the 10th of September, 1794, and delivered to the defendant as an *escrow*, was by the defendant delivered to Hall, who accepted the same, and that the lands contained in that deed were by the defendant sold to Morris and Nicholson, and were afterwards, on the 17th of November, 1794, by deed conveyed, in pursuance of the sale, to M. and N. by the deed of the 17th of November, 1794, before set forth. That the deed so made by Hall, was accepted by M. and N. as a good and valid assurance and conveyance of the lands. And further, that since that period M. and N. have conveyed these lands to third persons; and that it does not appear from the evidence in the case that any person claiming under or through the deed of the 10th of September, 1794, has ever at any time objected to the operation and validity of that deed, except the defendant, the agent, who sold the lands, and received the consideration, and who now objects to the title conveyed by that deed. The plaintiff further offered in evidence, that on the 27th day of May, 1800, the contract of the 15th of November, 1794, between the defendant and Hall on the one part and M. and N. on the other, was delivered up to the defendant and Hall, or one of them, and was thereby cancelled; to prove which, the plaintiff offered evidence that the said contract is now in the possession of the defendant, and is here produced in Court by him, and was in his possession on the 1st of March, 1803, when he produced it to the plaintiff, and procured it to be admitted by him in and by the paper of admissions herein before set forth. The plaintiff also offered in evidence the agreement of the 15th of November, 1794, and the receipt of \* M. and N. endorsed thereon, bearing date the 27th of May, 1800, signed in the hand-writing of **688** M. and N. and also the other indorsements on that agreement; and the circumstance that no evidence has been offered by the defendant to show that two parts of the contract of the 15th of November, 1794, was executed, or that any other agreement of the same tenor and date therewith now exists; and also the circumstance, that no evidence has been offered to the jury that M. and N. or either of them, or any person or persons claiming under them, have at any time, since the date of the receipt, set up any claim against the defendant, or Hall, or any other person or persons, founded on the contract of the 15th of November, 1794; and also offered in evidence, for the purpose aforesaid, the deed from Hall and wife to M. and N. herein before set forth.

(a) The testimony and opinions of the Court, as stated in the several bills of exceptions herein before set forth, were read to the jury, and bills of exceptions again taken. The defendant's counsel having made the prayer hereinafter mentioned, the plaintiff offered the further evidence here stated.

remarkably redundant, and remarkably deficient. He had resorted to authorities without number to support principally what nobody denied, and abandoned the field of fair argument.

\* He acquits the Attorney-General of all criminal motives.

**741** No man is better acquainted with his generosity and utter negligence in pecuniary concerns. No doubt he received the fee under an entire conviction that he had a right to it. The honor of the Attorney-General is not in question. He must stand upon a legal bottom—Upon the last only we are at issue. The sole question before the Court, is what is the true construction of the Act of 1715 with reference to the fees in the General Court?

\* The Court of Appeals affirmed the judgments of the  
**743** General Court in both the cases.

## COURT OF APPEALS, JUNE TERM, 1805.

### SCRIVENER'S Adm'r *vs.* SCRIVENER'S Ex'rs.

When an administrator has failed to return in his inventory a part of the personal estate of his intestate, limitations cannot be set up as a defence to a bill by a personal representative of the intestate against the executor of the administrator.

General exceptions to the auditor's report ought not to be made. Every exception ought to point out a particular error.

APPEAL from a decree of the Court of Chancery dismissing the appellant's bill of complaint. The bill filed on the 28th of March, 1799, charges that Mary Scrivener, mother of William Scrivener, the complainant's intestate, obtained letters of administration on the estate of John Scrivener, the father of the said William, and paid the said William sundry specific articles of stock, &c. and two negro women, to wit, Grace and Hagar, which Hagar afterwards had issue a daughter called Meriah, both now alive. That the \* said  
**744** William was entitled to a distributive part of the personal estate of his deceased brother, Richard Scrivener, and that in satisfaction of said distributory portion, some stock, and a negro man called Tim, was delivered to him. That the said Mary Scrivener, in her life-time, after the delivery of negro Grace to the said William, sold the said negro woman Grace, and received the purchase money, and has never accounted for the same to the said William. That the said Mary died intestate in the year 1772, and that Francis Scrivener, brother of the said William, administered on her estate, and afterwards paid two negroes to the said William in part of his share of his mother's personal estate, but kept and detained the rest of the personal estate to which the said William was by law entitled. That the said William is lately dead, leaving several poor relations,

to whom their legal proportion of his estate is an object of consequence; that he was for thirty years last past in a state of such imbecility of mind as to be utterly incapable of doing or transacting any business, or of making any contract or disposition of property. That Francis Scrivener is lately dead, having made his will and thereby appointed the defendants his executors, who have proved the will, and obtained letters testamentary. That the said Francis took into his possession the whole negroes and personal property of the said William some time in 1772, and has used, worked, and enjoyed the same to his own exclusive use and benefit, until his death, and by the defendants since that period to the present time; and neither the said Francis in his life-time, nor the defendants since his death, have accounted for or paid over to the said William or the said complainant, any thing or satisfaction therefor. That the said Francis, taking advantage of his brother's weakness and imbecility of mind, kept him in an out-house, clothed, fed, and worked him as a negro, and with his negroes, and received from his labor, through a period of many years, great pecuniary benefit and emolument, far exceeding the value of his food and clothes. That \* the said Francis, to cover his improper and fraudulent conduct, drew **745** up a will, in which he devised to himself all the estate of the said William, and then caused the said William to sign the same, thereby intending to secure to himself his estate and exemption from any account as to its value—But that the said William, at the time of signing the said instrument or will, was, by reason of mental weakness and imbecility, foolish, childish, and incapable of making or understanding one. That the said instrument, purporting to be the will of the said William, on the decease of the said Francis, came to the hands of the defendants, who with great honesty and fairness, knowing the circumstances of their personal knowledge, and calling on the witness, who refused to prove it, permitted letters of administration in the usual form of intestacy to be granted to the complainant. That he the complainant has called on the defendants, the executors of the said Francis, to account with him for the use, profits and enjoyment, of the said William's estate, whilst in possession of their testator, and whilst in their possession since his death, and to pay the same over, which reasonable request the defendants have refused to comply with. Prayer for an account, &c.

The answers of the defendants admit the said Mary obtained letters of administration on the estate of her deceased husband John, and that the said William was entitled to a distributive share, which the said Mary did actually pay to the said William on the 14th June, 1763, as by his receipt produced in full for his share of his father's estate. They have heard that the said William obtained a negro man named Tim, as his proportion of his brother Richard's estate, but that the said negro has been dead 20 or 30 years past. They do not know or admit that he ever was in the possession of

the said Francis. They do not know that negro Grace was, after she was given to the said William, sold by the said Mary, or that she received the money arising from the sale; but they admit, that **746** on the death of the said Mary the \* said William was entitled to a proportion of her estate. That the said Mary has been dead upwards of 18 or 20 years past, and that on her death the said Francis obtained letters of administration on her estate, and did, as the defendants believe, pay and satisfy the said William for his proportion of the said estate, as will appear by a receipt given by him on the 1st of January, 1775, to the said Francis the administrator. They admit that the said negro James, (mentioned in the last receipt,) and Hagar, lived with and worked for the said Francis until his death, which happened in 1797; and they admit the said William also lived with and was supported by the said Francis until his death, which happened in 1795 or thereabouts. That since the death of the said William and Francis, the said negro Hagar has been permitted to go at large by the complainant. That the said two negroes are about 60 years of age, and of course rather an expense than profit. That they were not included by the defendants in the inventory returned by them of the estate of the said Francis, nor do they claim them as such. They admit that the said William was a man of weak mind, and incapable of managing for himself, and that he lived with and was under the care of his brother Francis; but they deny that the said Francis made a profit by his labor, or treated him as a negro, or worked him as such; but that he lived with the said Francis as one of the family, and amused himself in any mode he thought proper; that in the latter part of his life, and at his request, the said Francis had a house furnished for him that he might live by himself, and that a negro boy, belonging to the said Francis, was constantly employed to wait on him, and that he eat in the family of the said Francis. That the labor of the slaves of the said William was not equal to the expense of maintaining him. They admit that the said negro Hagar had a daughter named Meriah, and that she is now about 30 years of age. That the said William, at the time when he was capable of managing for himself, exchanged the said Meriah, when she was young, with the **747** said Francis, \* for a horse, and the said Francis, afterwards, (25 years ago,) held and claimed her. That Meriah has, on the distribution of the said Francis' estate, been given to Polly his daughter. They do not know that the said William was ever entitled to negro Sall, as stated in the bill, or that she ever belonged to the said Richard Scrivener. That she was always held as the property of the said Francis. From the length of time in which the different events stated in the answer took place, the defendants pray the aid of the Act of Limitations, and plead the same in bar to the complainant's bill, and of the relief prayed, &c.

The parties agreed that the auditor should state an account between them, and return the same to the Court of Chancery, there to be liable and subject to every exception, which could be made against a decree to account, by either party, within 30 days after the return. The auditor accordingly stated sundry accounts, and made report thereon to the Court of Chancery—and the complainant's counsel excepted to the auditor's report and accounts, "because the accounts No. 4, &c. against the weight of evidence, state balances in favor of the defendants, when according to the evidence the balances ought to be in favor of the complainant." And the defendants' counsel also excepted to the said report and accounts, "because the accounts No. 4, &c. against the weight of evidence, state a balance due to the complainant, when the balance, according to the evidence, should be in favor of the defendants." There had been much evidence taken under a commission, and also by the auditor. The case was argued before the Chancellor on the exceptions of each party to the auditor's report.

HANSON, C. (21st of March, 1803.) The auditor had stated an account without any order of the Chancellor, but merely on the agreement of the parties, reserving the equity, &c. And the exceptions are only general, viz. that the auditor has stated against the evidence; such exceptions, the Chancellor \* conceives, ought never to be filed; every exception, in his opinion, ought to 748 point out a particular error or errors, and general exceptions only transfer in effect the examination of the papers from the auditor to the Chancellor. He has however examined the papers.

He wishes it impressed on the minds of the gentlemen of the bar, that this Court neither decides on titles to property, nor determines important litigated points of law.

The complainant grounds his application chiefly on the point, that certain property of Mary Scrivener was not returned in the inventory by John Scrivener, and it seems that John Scrivener claimed it as his own property. Is the Chancellor now on depositions to ascertain in which of them was the right of property? A great number of years have elapsed since the death of the said Mary; and no proper legal steps seems to have been taken on account of the supposed omission in the inventory. In short, the Chancellor will not undertake to decide with respect to the right of the said property.

As to the exceptions, the Chancellor can only say, it appears to him that none of the auditor's statements is right, except merely his calculations, which are seldom (if ever) wrong. The Chancellor would state the account himself, if it were not, that on examination of the great mass of strange evidence he is far from being satisfied that the complainant as administrator of William Scrivener is entitled to claim any thing on an account to be stated fairly between

John and William Scrivener, for clothing and maintenance, on one side, and for labor, the use of property, &c. on the other side.

From the manner in which the cause was argued, the Chancellor considered, that he was hearing it finally; and he sees no reason for postponing a final decision. Decreed—that the bill of the complainant be dismissed; and that the defendants be hence dismissed, but without costs. There is no necessity for deciding with respect to limitation or the lapse of time.

**749** \* From which decree the complainant appealed to this Court.

*Key* and *Shaaff*, for the appellant.

*Martin*, (Attorney-General,) *Pinkney* and *Johnson*, for the appellees.

The Court of Appeals, [RUMSEY, CH. J. JONES and DENNIS, JJ.] at this term, (June, 1805,) reversed the decree of the Court of Chancery—And decreed, that the appellant shall be allowed against the appellees for one-fourth of the personal property of Mary Scrivener not included in the inventory returned by her administrator Francis Scrivener, the said one-fourth part amounting, as stated by the auditor in his report made to the Court of Chancery, to the sum 86*l.* 15*s.* 0*d.* current money; that the appellant shall also be allowed ten years hire of the following negroes, from the 4th of April, 1772, to the 4th of April, 1782, and at the following prices, to wit: Tim at £15 per annum; Jem at £15 per annum; and Hagar at 7*l.* 10*s.* 0*d.* per annum; and also the following sums annually for the following negroes, from the said 4th of April, 1772, to the 1st of January, 1797, to wit: for Jem £15, and Hagar 7*l.* 10*s.* 0*d.* and the sum of 5*l.* 10*s.* 0*d.* per annum for the negro Meriah, from the 1st January, 1790, to 1st January, 1797. That the appellees be allowed against the appellant the sum of £15 per annum, from the 4th of April, 1772, to the 1st January, 1797, for the board and maintenance of William Scrivener, deceased; and the appellees shall also be allowed one-third part of the balance due the appellant, after deducting as aforesaid for the board and maintenance of the said W. Scrivener; the said one-third part being the proportion due the appellees as their share of the personal estate of the said W. Scrivener—and the balance remaining due to the appellant after the aforesaid deductions for the appellees shall, under the particular circumstances of this case, only bear interest from the 28th of March, 1799, the time of filing the bill—And that the appellees shall pay the said appellant the said balance, with the interest aforesaid, together with one-third part of the appellant's costs of \* suit, both in the Court of

**750** Chancery and this Court. And that the Chancellor pass such order and decree in the premises as shall be proper and sufficient to carry into effect the judgment and decree of this Court therein.



## COURT OF OYER AND TERMINER, &amp;c. JULY TERM, 1805.

## THE STATE vs. FISHER.

*Quere.* Whether a mulatto, born free of a manumitted negro mother, is a competent witness against a free born white Christian, in a prosecution for felony?

INDICTMENT for felony. Not guilty pleaded. At the trial, Rebecca Syntha, a mulatto woman, born free of a manumitted negro mother, was offered as a witness—but who was objected to by the counsel of the prisoner as incompetent to testify against him, he being a free born white Christian man. But the Court, (DORSEY, Ch. J.) admitted the witness, declaring at the time that if the prisoner should be convicted, they would postpone judgment until the opinion of the Judges of the General Court could be taken whether the witness was competent to give evidence against the prisoner, and declaring at the same time that a contrariety of opinion had taken place upon the subject.

Verdict, guilty, and a petition prepared and presented to his Excellency the Governor, stating the facts in the case, praying that he would lay the same before the General Court for their opinion.

The abolition of the General Court prevented that Court from acting on the petition, and it was laid before the Court of Appeals at June Term, 1806. But the Judges having a diversity of opinion upon the subject, requested the attorney-general to inform the Governor that the Court could not agree in opinion upon the question.

By the Act of May, 1717, ch. 8, s. 1, it is enacted, “that no negro or mulatto slave, free negro, or mulatto born of a white woman, during his time of servitude \* by law, be admitted and received as good and valid evidence in law in any matter or thing whatsoever depending before any Court of record, or before any magistrate, wherein any Christian white person is concerned.” 751

## GENERAL COURT, OCTOBER TERM, 1805.

## HEATH'S Lessee vs. EDEN's Guardian.

Where the acknowledgment of a deed by a *feme covert* grantor was held to be defective, because it did not substantially pursue the mode prescribed by the Act of Assembly, whereby *femes covert* may convey their interest in lands.

EJECTMENT for a tract of land called The Wolf Holes and another tract called Cole's Adventure, lying in Saint Mary's County.

By a statement of facts agreed on by the counsel in the cause, the question submitted to the Chief Judge of this Court was, whether or not the acknowledgment of Mary, the wife of Daniel C. Heath, made to the deed executed on the 23d of August, 1776, by them to Townshend Eden, for the tract of land called Wolf Holes, was sufficient to pass the estate which she claimed therein under a devise from her father, Richard W. Key. Which acknowledgment, made before two justices of the peace, is in the following words, viz. "St. Mary's County, *sc.* August 23d, 1776. Then came Daniel Charles Heath and Mary his wife, parties to the within deed, and acknowledged the same to be their act and deed according to the true intent and meaning of the same. And at the same time came Mary Heath, who being by us privately examined out of the hearing of her husband, acknowledged her right of dower to the within land and premises, and declared she did the freely and voluntarily, without threats or fear of her said husband displeasure."

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• *Key, Harper and Buchanan*, for the plaintiff.

*Shaaff*, for the defendant.

CHASE, Ch. J. I am of opinion the deed from Daniel Charles Heath, and Mary Heath, to Townshend Eden, executed on the 23d of August, 1776, for Wolf Holes, cannot operate to transfer the estate and interest which Mary Heath had and held in the said land to Townshend Eden; her acknowledgment of that deed being defective in not substantially pursuing the mode prescribed by the Act of Assembly whereby *femes covert* may convey their interest in lands. And I do accordingly direct judgment to be entered for the plaintiff.

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#### GENERAL COURT, OCTOBER TERM, 1805.

##### WILLIAMS' Ex'r vs. WILLIAMS.

The plea of payment to an action of debt on a bond cannot be withdrawn to plead *nul debet*. It may be to plead *non est factum*, on the payment of costs.

ACTION of debt brought in Calvert County Court, and removed to this Court by a writ of *habeas corpus cum causa*. At May Term, 1804, the defendant pleaded payment, to which there was the general replication, and issue was joined.

*Key*, for the defendant, at this term stated, that it was an action of debt to recover the amount of a bond stated to be improperly gotten possession of by the defendant. That the clerk, as a matter of course, under the general directions of the bar, in complying with

the rule laid on the defendant to plead, as no other plea was put in, entered the general issue plea of payment.

He moved the Court to give him permission to withdraw the plea of payment, for the purpose of pleading *nil debet*.

*Johnson* and *Duckett*, for the plaintiff, objected to leave being granted, and cited *Bull. N. P.* 170; 2 *Raym.* 1500; 5 *Burr.* 2586; 3 *T. R.* 151; 1 *Fonb.* 14, (*note.*)

\* CHASE, Ch. J. If the plea has been put in by the clerk, at the request of counsel, it is to stand as the plea of the counsel. The Court cannot give leave to withdraw the plea to permit the defendant to plead *nil debet*. The plea of *non est factum* would be a full defence. If it had been pleaded and demurred to, the Court would have adjudged it the proper plea, and overruled the demurrer. 754

*Key*, then moved the Court for leave to withdraw the plea of payment for the purpose of pleading *non est factum*.

Granted by the Court, on payment of the costs which have accrued at the present term.

## GENERAL COURT, OCTOBER TERM, 1805.

### GWINN *et ux.* vs. WHITAKER'S Adm'r.

Every judgment for money carries interest from its date, unless the terms agreed on provide otherwise, or the nature of the judgment prohibits it. (a)

Where a debtor owes his creditor on different accounts, he has the right to apply any payments he makes to which of them he pleases. If he neglects doing it, the creditor has the right. (b)

(a) Under Rev. Code, Art. 64, s. 124, all judgments by confession, on verdict, or by default, shall be so entered as to carry interest from the time they were rendered. See *R. W. Co. vs. Sewell*, 37 Md. 455; *Preston vs. West*, 4 H. & McH. 56; *Jenkins vs. Hay*, 28 Md. 547; *Hammond vs. Hammond*, 2 Bland, 370-374. But the damages assessed to owners as compensation in the condemnation of property for opening a street, do not bear interest. *Norris vs. Baltimore*, 44 Md. 598.

(b) Affirmed in *Neidig vs. Neidig*, 29 Md. 185. Where divers debts are due from a person and he pays money to his creditor, the debtor may, if he thinks proper, appropriate the payment to the discharge of any one or other of those debts; and, if he does not appropriate it, the creditor may make an appropriation. But if there is no special appropriation by either party, and there is a current account between them, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side. And when the demand is entire, the creditor will not be allowed to separate, or split such demand into parts, and appropriate

If the debtor owes on mortgage and on simple contract, or on bond and simple contract, and makes a payment without particularly applying it, the law will apply it to the mortgage or to the bond, as most beneficial to the debtor. (a)

Where a debtor is indebted on bond and on judgment, and sells his land, and the purchaser of the land makes the creditor a payment without applying it, the law will apply it to the judgment debt.

The interest on a judgment may be levied under an execution on the judgment as well as the principal.

In debt on a judgment bearing interest, the jury must assess damages equal to the interest.

A payment by a debtor must be first applied to extinguish the interest of his debt, and then to the principal, and a different application is not in the discretion of the debtor. (b)

The legal mode of adjusting the payments in this case.

Two writs of *fiery facias* returnable to this term.

Submitted to the Chief Judge, on a case stated, for his opinion.

CHASE, Ch. J. Two judgments obtained by the plaintiffs against the defendant, in the General Court at October Term, 1797, one for £600 current money damages, and costs, to be released on payment of 357*l.* 15*s.* 6½*d.* current money, with interest on 194*l.* 8*s.* 10½*d.* current money, part thereof, from the 3d of September, 1797, and costs. The other for £1,000 \* current money damages, and costs, to be released on payment of 425*l.* 1*s.* 6*d.* current money, with **755** interest on 231*l.* 0*s.* 5*d.* current money, part thereof, from the 3d of September, 1797, and costs.

It is stated that several payments have been made by the defendant to the plaintiffs' agent at different times, on account of the

a general payment to that part which it is most advantageous to him should be paid. *Harris vs. Hooper*, 50 Md. 550; *Trustees vs. Heise*, 44 Md. 453; *Lee vs. Early*, 44 Md. 93; *Mitchell vs. Dall*, 4 G. & J. 361.

(a) Affirmed in *Laerber vs. Langhor*, 45 Md. 482, and in *McTavish vs. Carroll*, 1 Md. Ch. 163.

(b) The rule for computing interest, in all cases where the debt carries interest and the debtor has made partial payments, is, that the interest is calculated from the time the debt became payable down to the day of the first payment, and the interest is added to the principal; then the payment is deducted from the whole, and if such payment satisfies the whole interest and a part of the principal, then the interest is calculated upon the balance of the principal to the day of the second payment, from the whole of which the second payment is deducted, &c. But, if the first payment does not discharge the whole interest, then, after applying it to the satisfaction of so much of the interest, the interest is calculated upon the principal only, until the day of the second payment, which is deducted from the whole amount and so on. So that in no way is any interest calculated and paid upon interest. *Hammond vs. Hammond*, 2 Bland. 383. See also *Rayner vs. Bryson*, 29 Md. 480; *Mitchell vs. Mitchell*, *Ibid.*, 581; *Glenn vs. Cockey*, 16 Md. 446; *Frazier vs. Hyland*, *ante*, m. p. 98; *Lamott vs. Sterett*, *ante*, m. p. 42; *Chapline vs. Scott*, 4 H. & McH. 69.

said judgments, without any particular application at the times they were made.

The question submitted to my decision by the counsel of the parties is, how these payments ought to be applied ?

I consider the following principles as established by the judgments of the Courts of Maryland, and in harmony with the decisions of the Courts of England.

That every judgment for money will carry interest from the obtaining of it, unless by the terms consented to by the parties, or the nature of the judgment, interest is not demandable, or only so in a particular way.

It is the general right of the debtor, if indebted on different securities, to make the application of moneys when he pay it, and if he omits to do it in those cases where both securities carry interest, or neither does, the right of application will devolve on the creditor.

If the debtor is indebted on mortgage and simple contract, or on bond and simple contract, and when he makes a payment should neglect to apply it, the law will make application of it in the way most beneficial to the debtor ; that is, to the mortgage or bond ; and in some cases the fund out of which the money arose will direct the application—as where A. is indebted on bond and on judgment, and sells his land, and the purchaser pays a sum of money to the creditor without application, the law will apply it to the judgment in exoneration of the land.

The execution must pursue the judgment, and in all cases where it will cover the interest as well as the principal, the interest may be levied by execution, if recoverable in an action of debt on the judgment.

In an action of debt on a judgment which bears interest, the jury have no discretion to allow or not \* allow interest, but must, under the direction of the Court, assess a sum of money by way of damages equivalent to the interest. **756**

Money paid by the debtor must be first applied to extinguish the interest, and the surplus, if any, to consume so much of the principal, and the debtor has no election to make a different application. The defendant in this case is indebted on two judgments, both qualified by the agreement of the parties as to the interest recoverable on each, and no interest can be recovered beyond such stipulation.

The particular sum mentioned in each judgment was specified to ascertain the interest which was to be paid on the judgment, and to prevent the plaintiffs from demanding or recovering interest on the whole sum. It was for the benefit of the defendant, operating as a reduction of the legal interest on the whole sum, and does not designate or appropriate one particular part of the debt more than the other as that on which the interest is to arise, so as to enable the defendant to apply her payment to it, or to let in the operation of law, on the principle that they became debts due on different securi-



		£	s.	d.
Brought forward.....		496	15	11½
By cash.....		56	5	0
		440	10	11½
May	16. To interest on £425 9 3¼, from the 7th January, 1803, to this day—4 months and 9 days.....	9	2	10¼
		449	13	9¼
By cash.....		37	10	0
		412	8	9¼
1804.				
May	7. To interest on the balance, (£412 8 9¼) from the 16th of May, 1803, to this day—11 months and 21 days.....	24	2	1¼
		436	5	11½
By cash.....		17	12	8
		418	13	8¼
Dec'r	12. To interest on £412 8 9¼, from the 7th May, 1804, to this day—7 months and 5 days.....	14	15	4¼
		433	9	0¼
By cash.....		75	17	7¼
		357	11	5¼
1805.				
Sept.	9. To interest on the balance, £357 11 5¼, from the 12th December, 1804, to this day—8 months and 27 days.....	15	18	2¼
		373	9	7¼
By cash.....		225	0	0
		148	9	7¼
Dec'r	21. To interest on the balance, (£148 9 7¼) from the 9th September, 1805, to this day—3 months and 12 days.....	2	10	5¼
To additional costs on executions.....		3	19	0
Balance due.....		154	19	1

*Key*, for the plaintiffs.

*Buchanan*, for the defendant.





# INDEX TO 1 H. & J.

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## ABATEMENT.

An action of replevin does not abate by the death of the original plaintiff, but his administrator or executor may appear and prosecute it. *Fister vs. Beall*, 24.

## ACCOUNT.

1. A probate of an account under the Act of 1729, ch. 20, omitting to state that the creditor had not received "any security" for his debt, is not evidence under that Act. *Smoot vs. Bunbury*, 89.
2. The omission of the word security in the probate of an account under the Act of 1785, ch. 46, (Code, Art. 37, s. 43,) is fatal. *Dyson vs. West*, 352.
3. Two several probates of the same account under that Act, taken at different times, cannot be considered together so as to make either complete, if in itself each be defective. *Ibid.*
4. The above Act, so far as it relates to the proof of accounts, must be strictly construed. *Ibid.*

See AMENDMENT, 2.

## ACKNOWLEDGMENT.

See DEEDS.

## ACTION.

1. The legal plaintiff has control over the suit, and may dismiss or prosecute it as he pleases, unless there be an assignment, &c. *Wilson vs. Hammett et al.* 98.
2. If A. contract with B. to sell a quantity of land belonging to the latter, under an agreement that he is to have one-half of the purchase money, A. is competent, if he does sell, to maintain an action in his own name for the whole of the purchase money, and it is not necessary that B. should join in the action. *Harper vs. Hampton*, 374.

## ADMIRALTY.

The sentence of an Admiralty Court is conclusive on the question of neutrality, if it plainly appear, or can be inferred from the sentence that such question was decided, but if it does not so appear it is not conclusive. *Gray vs. Swan*, 94.

## ADVERSE POSSESSION.

See EJECTMENT.

LIMITATIONS.

## AGENCY.

1. Where the agent of a corporation contracted in his own name, under seal, with another person, but it was stated in the body of the con-

AGENCY.—*Continued.*

- tract that the agent acted in behalf of the corporation, it was held that he was not personally liable. *M'Donough vs. Templeman*, 104.
2. The agent of a corporation need not be appointed by deed. *Bank vs. Norwood*, 259.
  3. A. in Charleston, authorized B. his agent in Philadelphia, to sell and convey certain land belonging to him; and to enable B. to do so, conveyed the land to him, and agreed that if B. should enter into any guaranty about the land, A. would indemnify him therefor. B. sold the land in Philadelphia, and agreed that within ten days after the sale, he would convey the same to the purchaser—by a good and sufficient deed. The deed from A. to B. proved to be defective, so that B. was not able to convey the land by a valid deed in the time agreed on, and since A. was in Charleston, it was impossible for him to have notice and perfect the title within the ten days. The purchaser accepted a deed from B. without objection. In an action by the principal against the agent for the purchase money received by the latter, it was *held* that although the plaintiff could not perfect the title within the ten days, he was bound to give an indemnity to the defendant for the warranty which the latter had entered into about the land, and that the plaintiff not having given the stipulated indemnity could not recover, although no objection to the deed had ever been made by the purchaser, and no claim had been made on the defendant on his contract of guaranty, and the defendant had never informed the plaintiff that the deed was inoperative. *Harper vs. Hampton*, 374.
  4. Where notes are received by an agent for his principal, and are held by the agent as a deposit, until certain engagements of the principal to the agent are fulfilled, and the notes become of no value while they are so held by the agent, the loss must fall on the principal. *Ibid.*
  5. But if the agent sells the notes, while they are so held by him, for less than their nominal value, without authority from his principal, and subsequently the engagements of the principal are discharged, and the notes rise in value, the principal can recover from his agent the increased value of the notes; or, if the notes become entirely worthless, the principal may elect to affirm the sale made by his agent, and may recover from him the price at which they were sold. But in such case the principal must prove an actual sale of the notes, and the price for which they were sold, or the principal may show an actual conversion of the notes by the agent, and their value at the time of their conversion. *Ibid.*
  6. A stipulation in a contract, on the part of a principal, that for any warranty or guaranty, his agent should enter into touching the sale of the principal's land, he would give him a sufficient indemnity, *Held*, to be a condition precedent to stipulations on the part of the agent, that a deed of the land was to be delivered by him to J. H. upon his paying the purchase money, which was to be received by the agent for his principal and accounted for to him. *Ibid.*
  7. Under the above contract the agent was not bound to pay over to his principal certain notes received for him, until the agent was in-

AGENCY.—*Continued.*

- demnified against his liability under an engagement entered into about the sale of the land. *Ibid.*
8. Where an agent sells the land of his principal, together with other land, and agrees with the purchaser to have the whole re-surveyed, he should give his principal notice of such re-survey; and whether there be such an undertaking, and if so, whether the notice be in fact given, are facts for the decision of the jury. *Ibid.*
  9. When it is necessary that an agent should give notice to his principal and under what circumstances a jury may presume that such notice was given. *Ibid.*
  10. When an agent contract a liability for his principal, and the principal has stipulated to save him harmless, he is not answerable to the principal until such security is given him, though many years have elapsed without his having been called on to answer for such liability. *Ibid.*

AMENDMENT.

1. A *scire facias* may be amended where a clerical error has been made, stating the judgment to have been obtained in 1797 instead of 1787. *Hazeldine vs. Walker*, 299.
2. The plaintiff not having filed an account to meet a count in his declaration for matters properly chargeable in account, is not a sufficient ground for the Court to grant leave to amend the declaration. *Dyson vs. West*, 352.

APPEAL.

1. An appeal lies from a judgment rendered by confession. *Quynn vs. State*, 26.
2. Where on plea of *nul tiel record* to an action of debt on a judgment, the Court decide by an inspection of the record, the record inspected takes no part of the proceedings, and does not go up to the Appellate Court, where there is an appeal. *Dorsey vs. Whetcroft*, 288.
3. If an appeal or writ of error be dismissed by the appellant or plaintiff in error, a second appeal or writ of error, though bond be filed, &c. will not operate as a *supersedeas*, where the first appeal or writ of error was a *supersedeas*. *Whetcroft vs. Dorsey*, 295.

See COURT OF APPEALS.

WRIT OF ERROR.

ARBITRATION AND AWARD.

1. Every ground of relief in equity against an award, is equally open at law, on motion, in a summary way.
2. Misbehavior of the arbitrator; or legal objections or a palpable mistake in law or fact, apparent on the face of an award, are the only ground for setting it aside.
3. An award set aside and the cause re-instated, where the original arbitrators, after reducing the evidence to writing disagreed, and chose a third person, to whom the evidence so reduced to writing, was delivered, and the award made; and it not appearing that the party, against whom the award was made, had notice of the time of meeting of the new arbitrator, nor was he present. *Goldsmith vs. Tilly*, 221.

ARBITRATION AND AWARD.—*Continued.*

4. If the amount of an award in favor of a plaintiff on a reference from the Court be at the time of awarding, less than the Court has jurisdiction over, there must be judgment of *non-suit*, though at the time of entering such judgment, such sum, with the interest added to it, would be sufficient to support the Court's jurisdiction. *Harris vs. Dorsey*, 258.
5. Where there is an award returned in favor of the plaintiff in an action of debt on bond, the judgment must be entered for the penalty of the bond, &c. *Fisher vs. State*, 254.

## ASSIGNMENT.

See ASSUMPSIT, 2.

## ASSIZE OF NOVEL DISSEISIN.

The writ of assize of novel disseisin does not lie to recover the office of Chief Justice of a district. *Whittington vs. Polk*, 150.

## ASSUMPSIT.

1. A promise by an administrator to pay a debt of his intestate is binding, if there be assets. and he may be sued, as administrator, in *assumpsit*, on such promise. *Forbes vs. Perrie*, 68.
2. A. being indebted to B. upon an open account, B. assigns the same to C. of which A. had notice, and promised to pay C. *Held*, that C. could recover the amount in an action of *assumpsit*; and that it was not necessary that the assignment should be in writing, or that it should be produced in Court. *Union vs. Paul*, 72.
3. When there is a subsisting special agreement which has not been fully performed by the plaintiff, he cannot recover on an *indebitatus assumpsit*, for work and labor. *Hannan vs. Lee*, 85.
4. But if the special agreement has been abandoned by the parties and a new contract made, which has been performed by the plaintiff, he may support an *indebitatus assumpsit*. *Ibid.*
5. The count for money had and received, can only be supported by proof of the actual receipt of money by the defendant. *Parker vs. Fassitt*, 204.
6. The defendant may, in an action of *assumpsit* for money had and received, give in evidence an account in bar without pleading it in discount or filing it. *Stone vs. Rafter*, 224.
7. An account in bar or set-off is inadmissible in evidence in an action of *assumpsit* on a special agreement. *Ibid.*
8. A count for money had and received will not lie except to recover money retained contrary to equity and right. *Green vs. Stone*, 247.
9. If money be paid on a judgment afterwards reversed, it may be recovered back in an action for money had and received, unless it was equitably due at the time of such judgment or payment; and such action will not be at all affected by the proceedings in the original action. *Ibid.*
10. *Indebitatus assumpsit* for goods sold and delivered, will not lie against the heir at law of a debtor where the personal estate is insufficient for the payment of the debts of the deceased, and the heir has received by descent real estate more than adequate to their discharge. *Lodge vs. Murray*, 306.

## ATTACHMENT.

1. The appearance of the defendant to an attachment, at the trial term, and his giving special bail after the garnishee has pleaded, and issue has been joined on such plea, dissolves the attachment, and the defendant is not bound by the plea of the garnishee, but may plead *de novo*. *Wilson vs. Starr*, 301.
2. Where the garnishee is indebted to the defendant by a promissory note, and an attachment is laid in his hands before such note is passed away by the defendant, whether it be before or after it is due, it is a lien on the amount of the note. *Steuart vs. West*, 332.

## ATTORNEY-GENERAL.

1. An attachment of contempt against a juror for non-attendance, is not an action for which the attorney-general can receive a fee for appearing on behalf of the State.
2. Where an indictment is found on a presentment in a criminal case, and the party presented and indicted submits the case to the Court, the attorney-general is not entitled to a fee of 200 lbs. of tobacco or 25s. *Martin vs. State*, 420.

## BAIL.

1. Bail to be discharged from a *scire facias*, on motion, when the principal has been released under a bankrupt law. *M'Causland vs. Waller*, 103.
2. Though the practice of a Court is not to require bail in an action on a bond with a collateral condition, yet if there be no rule of Court to that effect, the defendant may be held to bail, if the plaintiff makes an affidavit for that purpose. *Coward vs. Bohun*, 334.

## BILL OF EXCEPTIONS.

1. A writ will be issued from the Court of Chancery to compel the justices of the County Court to sign and seal a bill of exceptions tendered to them. *Briscoe vs. Ward*, 107.
2. A bill of exceptions may be taken to the opinion of the Court on any question decided relative to the practice adopted therein. *Ibid*.

## BILLS OF EXCHANGE AND PROMISSORY NOTE.

1. Notice of the non-acceptance of a foreign bill of exchange must be given to the endorser in due time. *Philips vs. M'Curdy*, 123.
2. What is due time is a question of law upon the facts of the case. *Ibid*.
3. An endorser is not liable upon a bill of exchange, when he has not had due notice of its non-acceptance; and his promise to pay the bill is not binding. *Ibid*.
4. The endorser of a foreign bill of exchange held not to be responsible to the holder, because the latter had failed to give the former due notice of the protest of the same for non-acceptance, and had not presented the bill for payment, and protested the same for non-payment at the time required by law, and because the drawee, being the holder of the bill, could not legally protest the same. *Ibid*.
5. Where the endorser of a promissory note lived seven miles from Baltimore, which was his nearest post-office, and on the day on which the note was protested a notice thereof, directed to the endorser, was mailed in Baltimore and it was proved that such notice

BILLS OF EXCHANGE AND PROMISSORY NOTE.—*Continued.*

was given according to the custom of Baltimore, it was held to be sufficient to charge the endorser. *Bank vs. Norwood*, 259.

6. The notice of the dishonor of a note need not expressly state that the holder looks to the endorser for payment. It is sufficient if the fact of non-payment, and that the holder looks to the endorser for payment can be reasonably inferred from the terms of the notice. *Ibid.*
7. Whether or not due diligence has been used by the indorsee of a promissory note to recover the money from the drawer, is a question of law. *Patton vs. Wilmot*, 292.
8. Where there has not been due diligence, a subsequent promise by the indorser to pay the note will make him liable. *Ibid.*

See ATTACHMENT, 2.

## BILL OF SALE.

1. The Act of Assembly requiring bills of sale of personal property to be acknowledged and recorded within a limited time, was designed to remove the presumption of fraud arising from the vendor's continuing in possession, but a bill of sale may be proved to be fraudulent from other circumstances. *Garrett vs. Hughlett*, 3.
2. A bill of sale of personal property of which the vendor retained the possession, if for a *bona fide* consideration, and duly executed, acknowledged and recorded, passed such property absolutely to the vendee; and the vendor is a competent witness to prove, that being in possession of the said property, he gamed the same away at cards. *Fister vs. Beall*, 24.

## BOND.

1. The heir at law of a deceased joint obligor is not answerable at law upon the bond. *Preston vs. Preston*, 225.
2. Where A. the principal in a bond died, and B. the surety therein, having been compelled to pay the debt, brought an action of *assumpsit* against the heir of A. to recover back the money so paid, it was held, that the defendant could not be held liable, unless sued as heir, and unless the declaration set forth that assets had come into his hands sufficient to pay the debt, and that he had expressly promised to pay it. *Ibid.*
3. In an action by the assignee of a bond, under the Act of 1763, ch. 23, (Code, Art. 9, s. 8.) against the assignor, it is not necessary to prove the execution of the bond. *Parrott vs. Gibson*, 242.
4. But there must be proof that the assignee used due diligence to recover the money from the obligor in the bond, and that the assignment was signed and sealed by the assignor. *Ibid.*
5. A writ of *diminution* granted to correct a judgment entered for the sum awarded in action of debt on bond, instead of being entered for the penalty of the bond, &c. *Fisher vs. State*, 254.
6. The plea of general performance to a bond with a collateral condition is like that of payment to a bond for money; and on a writ of inquiry need not be produced when there is oyer of it in a record. *Reid vs. Wethered*, 273.

See ARBITRATION, 5.

DEED, 19.

## COMMON RECOVERY.

A common recovery suffered before the Act of Nov. 1766, ch. 21, which was defective for the want of a good tenant to the *precipe*, was remedied by that Act, if any of the parties was a tenant of the freehold; and the execution of a lease for a year by the tenant of the freehold with a view to the suffering such recovery, does not incapacitate the lessor from being considered as the actual tenant of the freehold within the meaning of the proviso in the said Act of 1766. *Hawkins vs. Burress*, 316.

## CONFLICT OF LAWS.

If a contract be made in South Carolina with a view to the receipt of money in Pennsylvania, the cause of action accrues upon the receipt of the money in Pennsylvania, and the Statute of Limitations of South Carolina is not a bar to the action. *Harper vs. Hampton*, 374.

See DEED.

## CONSTITUTIONAL LAW.

An Act of Assembly repugnant to the Constitution is void. *Whittington vs. Polk*, 150.

The Court have a right to determine an Act of Assembly void, which is repugnant to the Constitution. *Ibid.*

The Act of Nov. Session, 1801, ch. 74, relating to the administration of justice, &c. is not unconstitutional. *Ibid.*

The Justices of the County Court under that Act, were not entitled to commissions during good behavior. *Ibid.*

That Act being limited to a certain number of years, and creating a judicial office without limitation as to time, it was held that the incumbent of the office had a vested right to hold it for the term of years originally limited for the continuance of the law, but that Act could at any time be constitutionally repealed, although the repealing Act, depriving the incumbent of his office would be unjust. *Ibid.*

## CONTRACTS.

1. In the construction of a contract, the Court will be governed by the apparent meaning of the parties, to be collected from the language of the contract and the nature of the transaction, and will not rely on the technical meaning of the words used. *Harper vs. Hampton*, 374.

2. In construing a contract, extraneous matter explanatory thereof may be resorted to. *Ibid.*

3. What seems to be technically a warranty may be considered to mean generally any engagement by which a liability is created, where such appears to be the intention of the parties. *Ibid.*

## CORPORATION.

1. Where the agent of a corporation contracting in his own name is not personally liable. *McDonough vs. Templeman*, 104.

2. The agent of a corporation need not be appointed by deed. *Bank vs. Norwood*, 259.

3. A certificate under the Act of 1792, ch. 55, entitled, an Act for securing certain estates and property for the support and use of the ministers of the Roman Catholic Religion, by persons stating that they were chosen, under the provisions of said Act, as trustees, to carry

CORPORATION.—*Continued.*

the same into effect, and that by virtue of such authority they assumed to themselves the corporate name and style of The Corporation of, &c. which was made by such trustees, and recorded as directed by said law, and which was accompanied with possession by them of the land in dispute, without objection by those who were interested, was held sufficient to authorize the jury to presume that such persons had been chosen in compliance with all the provisions of said law, though it did not appear by such certificate, or in any other way, that those provisions had been complied with. *Corporation vs. Hammond*, 360.

## COURT OF APPEALS.

The Court of Appeals will take notice of testimony improperly admitted in evidence in the Court below, although it was not objected to and made no part of the question decided by the Court below.

The Court of Appeals will not give an opinion on any abstract proposition. *Gittings vs. Hall*, 11.

## COVENANT.

A covenant can only be dissolved by a matter of equal solemnity with itself.

If a breach of covenant has accrued, accord and satisfaction is a good plea, but it is not a good plea as to breaches which had not taken place at the time when accord and satisfaction were made. *Harper vs. Hampton*, 374.

## CRIMINAL LAW.

1. A person convicted of murder may be sentenced by the Court to work and labor on the public roads, &c. being one of the crimes of felony enumerated in the 10th section of the Act of 1793, ch. 57. *The State vs. Negro Ben*, 59.
2. Where goods are stolen out of this State and are brought by the thief into the State, the offence is cognizable by the Courts of this State. Whether a writ of error will lie in a criminal case. *Cummings vs. State*, 206.
3. A failure to prove an unnecessary averment in an indictment will not vitiate it. *U. S. vs. Vickery*, 261.
4. Where the indictment charged that the prisoner was employed in transporting slaves from Martinique to Cumana, and the evidence produced was that he transported the slaves from Nevis to Cumana—*Held*, that the indictment, being in the words of the statute, is sufficient without any averment of the place, which was unnecessary and mere surplusage, and that proof of the transportation from Nevis supported the indictment. *Ibid.*
5. Where a statute directs a fine and imprisonment to be imposed for an offence, the Court are bound to inflict both, if the party is found guilty. *Ibid.*

## DEED.

1. A person being in possession of part of a tract of land under a deed conveying to him the whole tract, may grant the whole by a deed of bargain and sale, without entering on that part of which he is not in possession, notwithstanding an adverse possession by enclosures. *Gittings vs. Hall*, 11.



DEED.—*Continued.*

2. Where a grantor conveys land by name, and lays the same off by actual survey, excluding a part so conveyed, it will not control the operation of the deed to pass the whole. *Ibid.*
3. An attested copy of a deed not required by law to be enrolled, cannot be received in evidence, unless the original be lost, and possession of the land has been held under it for forty years. *Ibid.*
4. To constitute a deed of bargain and sale there must be a money consideration expressed therein. *Ibid.*
5. The Court are to decide, on inspection, whether or not a deed was indented, and the original must be produced for that purpose. *Ibid.*
6. A conveyance of land acknowledged by the grantor before two Justices of the Peace in a county in which he did not reside, and wherein the land is not situated, held to be inoperative. *Ibid.*
7. Parol evidence may be received to prove that a grantor, although stated in the deed to reside in a particular county, was a resident of the county in which the deed was acknowledged. *Ibid.*
8. The jury were directed to presume a valid deed had been executed, after a defective conveyance had been refused to be permitted to be given in evidence, there being evidence of possession by and under the grantee in the deed. *Ibid.*
9. A tenant in common of an undivided tract of land cannot convey his moiety by courses and distances. *Carroll vs. Norwood*, 80.
10. The time when a deed was recorded is a matter of fact to be determined by the jury. And when possession has been held under an ancient deed, the jury ought to presume that it was recorded within the time limited by law. *Carroll vs. Norwood*, 108.
11. A deed for a moiety of a tract of land, describing it also by courses and distances, will convey only so much of the land as is included within the courses, although the same may be less than a moiety of the tract. *Ibid.*
12. An ancient deed, not recorded in the county where the land lies, is admissible in evidence, without proof of its execution, if possession has been held under it. When possession has been held under a deed, the jury ought to presume livery of seisin of the land. *Ibid.*
13. A misrecital of a deed as to its date is not material. *Ibid.*
14. When the grantee in a defective deed is, at the time of the execution thereof in possession of the land under a bond of conveyance, such deed might operate to convey, as a release, the fee to the grantee, and a subsequent deed from the grantor to another person would be inoperative. *Ibid.*
15. But such defective deed will not operate as a deed of bargain and sale, so as to affect the title of such other person, unless he had notice, &c. *Ibid.*
16. A deed recorded under a decree of Chancery has the same force as if it had been recorded in time, as against all persons not within the exception contained in the Act of Assembly. *Ibid.*
17. Certain deeds defectively acknowledged by a *feme covert* grantor, were held not to pass the estate in the land to the grantee. *Jacob vs. Kraner*, 177.
18. A deed defectively acknowledged by a *feme covert* grantor held not to pass a title in the land to the grantee. *Peddicoart vs. Rigges*, 178.

DEED.—*Continued.*

19. The delivery of every deed must be proved, as well as the execution of it, being an essential requisite to the validity of it; but the possession of a bond being with the obligee is sufficient evidence of a delivery. *Clarke vs. Ray*, 189.
20. The omission of the words "ill-usage," in the certificate of the acknowledgment made by a *feme covert* grantor, invalidates the deed, notwithstanding it was stated that she made the acknowledgment "of her own free will, and not through any threats of her said husband, or fear of his displeasure." *Hawkins vs. Burress*, 316.
21. Although a deed cannot operate as a bargain and sale, it may operate as a feoffment, (there being words "give and grant,") if livery of seisin can be proved, and there may be circumstances from which livery may be presumed. *Chaney vs. Watkins*, 325.
22. To constitute a deed of bargain and sale there must be a money consideration, or general words of consideration under which a pecuniary consideration may be averred—other land being expressed to be the consideration is not sufficient. *Ibid.*
23. If "divers good causes and considerations" are used in the deed, without mentioning any specific consideration, the party may aver what the consideration was: and if money be averred as the consideration, it will make it a deed of bargain and sale. *Ibid.*
24. If the consideration is blood, marriage, or natural love and affection, the deed will operate as a covenant to stand seised. *Ibid.*
25. If a deed will not have operation in one way, it may operate in some other way. *Ibid.*
26. Neither the record of enrolment, nor a copy of a deed not directed by law to be enrolled, can be admitted in evidence. *Ibid.*
27. From great length of possession of the land, &c. jury may presume a conveyance. *Ibid.*
28. The Act of 1715, ch. 47, cured no defects in the acknowledgments of deeds made under previous laws, with regard to *femes covert*.
29. Before that Act, as well as after, those acknowledgments were defective, unless the exact form mentioned in the Acts of Assembly on the subject, was complied with. *Corporation vs. Hammond*, 360.
30. A deed by an attorney is invalid unless his authority is strictly pursued. Such a deed should be in the name of the principal. *Harper vs. Hampton*, 374.
31. The validity of a deed conveying land in another State is to be determined by the laws of this State, unless the law of such other State be given in evidence. *Ibid.*
32. Where the acknowledgment of a deed by a *feme covert* grantor was held to be defective, because it did not substantially pursue the mode prescribed by the Act of Assembly, whereby *femes covert* may convey their interest in lands. *Heath vs. Eden*, 427.

See EVIDENCE.

EJECTMENT.

## DEPOSITION.

1. It must appear on the face of the return to a commission to mark and bound lands, that sufficient notice had been given by the commissioners to the parties interested. *Lowes vs. Holbrook*, 101.

DEPOSITION.—*Continued.*

2. A commission to mark and bound lands, and the return thereof, permitted to be read in evidence, although five years has not elapsed since the recording thereof, to have what weight the jury think it deserves, but is not conclusive evidence. *Ibid.*
3. The commissioners appointed under the land law of 1715, ch. 45, acted judicially, and their judgment is conclusive between the parties, unless reversed on an appeal; and as between strangers the proceedings are evidence in the same manner that hearsay is admissible to prove the bounds of land. *Davis vs. Batty*, 168.
4. Where the commissioners appointed to perpetuate the bounds of lands have not been sworn agreeably to law, the deposition of a witness taken by them cannot be read in evidence. *Tolly vs. Ford*, 251.

See EVIDENCE.

## EJECTMENT.

## DESCENT.

There is no distinction, under the Act of 1786, ch. 45, to direct descents, between brothers and sisters, (children of the same father,) of the whole and half blood, where the estate descended from the father. *Lowe vs. Maccubbin*, 342.

See WILLS.

## DIMINUTION.

A writ of diminution granted to arrest a judgment. *Fisher vs. State*, 254.

## DISTRESS.

See LANDLORD AND TENANT.

## EJECTMENT.

1. The defendant cannot prove on the trial that the locations made on the plots in the cause were not in compliance with his instructions to the surveyor. *Gittings' Lessee vs. Hall*, 11.
2. Where the plaintiff in ejectment locates his pretensions on the plots in two ways, and there is a general verdict and judgment thereon rendered, such judgment is void for uncertainty. *Ibid.*
3. To prove a witness interested in the event of the suit, by holding land interfering with that in dispute, the land claimed by the witness must be located on the plots. *Ibid.*
4. Where the Lord Proprietary, and J. Y. were tenants in common of a tract of land in 1686, at the time when the Proprietary was in Maryland, where he remained for two years thereafter, and J. Y. entered upon and claimed the whole tract adverse to the right of the Proprietary, &c. and where J. Y. and those claiming under him, had the uninterrupted possession of the land, claiming the whole from the year 1687 to 1780, and the Proprietary accepted quit rents for the whole of the said land from 1733 to 1767 from J. Y. and those claiming under him—*Held*, that the Lord Proprietary was barred by the adversary possession of J. Y. and those claiming under him. *Russell vs. Baker*, 45.
5. Where D. is in possession of vacant land, which the Proprietary afterwards grants to P. who enters, but is ousted and continued out of

EJECTMENT.—*Continued.*

- possession at the time of making his will and death—*Held*, that the possession of D. was an intrusion, and that P. was not disseised, but that the land passed by his will to his devisees. *Ibid*.
6. A deed for part of a tract of land cannot be read in evidence, if defence is taken on warrant, unless such deed, and the courses therein described, are located on the plots. *Carroll vs. Norwood*, 60.
  7. Leave given to the defendant to narrow the defence taken on the plats, on payment of costs. *Howard vs. Cromwell*, 73.
  8. Where two deeds, one of a portion and the other of the residue of a tract of land, are offered in evidence in an action of ejectment, they are admissible, without being located, when the whole tract has been located. *Hall vs. Gough*, 77.
  9. When a defective deed has been located on the plats, evidence of possession under the same is admissible, although particular places of possession are not located. *Carroll et al. vs. Norwood*, 108.
  10. A deed, although located on the plats by the wrong name, may be read in evidence.
  11. Evidence as to where a tree stood is not admissible, unless the place be located on the plats. *Ibid*.
  12. Defendants in an action of ejectment, after having taken a joint defence, are not permitted, at the trial, to sever their defence. *Ibid*.
  13. If the adversary possessions of the defendant are not located on the plats, no evidence can be given of them. *Carroll vs. Norwood*, 108.
  14. A judgment entered on a verdict for the plaintiff in ejectment, for land described as beginning at a point, (not located on the plats,) to be found by running a certain line, &c. being for land not described by any particular location on the plats, but which was included within the plaintiff's pretensions. *Ibid*.
  15. Whether adversary possession must be by actual enclosures for twenty years before the action is brought. *Dorsey vs. Hammond*, 126.
  16. The jury are not estopped or concluded by the locations made by either party on the plots, so that the part for which they give their verdict is included within the plaintiff's claim. *Darnall vs. Goodwin*, 173.
  17. Defence on a warrant may be changed to general defence on the defendant's paying the costs of the survey. *Cheney vs. Watkins*, 180.
  18. In the trial of an action of ejectment, either party may avail himself of equitable circumstances in his case to prevent the relation of a grant to the certificate of survey, if such circumstances exist; and whether there are such circumstances or not, it is competent for a Court of law to decide. *Garretson vs. Cole*, 227.
  19. The declarations of a person who is dead, and whose deposition was taken under a commission to perpetuate the bounds of land, defectively executed, may be given in evidence in an action of ejectment by the person who took the deposition as a commissioner, though not legally empowered to administer an oath, and he may turn to the deposition to refresh his memory; but such declarations are not to be received as made on oath. *Tolley vs. Ford*, 251.
  20. The declarations and shewings of the patentee of a tract of land, as to the beginning, as located by the party claiming under him, are not legal evidence for the purpose of impeaching the credibility

**EJECTMENT.**—*Continued.*

- of testimony proving the patentee had at a different time made different declarations and shewed a different place, &c. *Ibid.*
21. Where the plaintiff brings an action of ejectment for an entire tract of land, and shows title to an undivided moiety of a part only, he may recover such moiety. *Cretzer vs. Thomas*, 282.
  22. A location made on the plots by one of the parties in an action of ejectment, and not counter-located by the other, is presumed to be admitted, and no evidence can be received against it. *Jarrett vs. West*, 308.
  23. The locations made by one of the parties in an action of ejectment, on a plot in another cause in which the other party was not interested, may be given in evidence against the party making them. *Ibid.*
  24. Information, as to the boundary of a tract of land, derived from a person who was interested at the time, is not competent evidence in an action of ejectment for the party claiming under the person so interested. *Ibid.*
  25. A plot and proceedings in an ancient action of ejectment between parties under whom the lessor of the plaintiff in another action of ejectment claims, admitted in evidence for the defendant in such other action, to prove his location of the land on the plots. *Ibid.*
  26. Where the plaintiff in an action of ejectment declares for a whole tract of land, and makes title to a part only, it is sufficient to locate such part on the plots, if there is no controversy about the location of the whole, and he may, on such partial location, read the patent in evidence. *Mitchell vs. Grover*, 313.
  27. The declaration in ejectment being for a tract of land called Rupalta, and the title being for one called Repalta is no variance, if it be proved to be the same land. *Ibid.*
  28. It seems, that where the lessors of the plaintiff in ejectment claimed as heirs at law under the Act of 1786, ch. 45, to direct descents, it is sufficient to count on a joint demise by all of them. *Ibid.*
  29. If the defendant in ejectment claims under a separate bequest of leasehold property, and A. B. has a similar bequest by the same will, and there is also an ejectment depending against A. B. for the property so bequeathed, brought by the same plaintiff, who is the executor of the will, A. B. is a competent witness for the defendant to prove that the plaintiff assented to the legacy to the defendant. *Cole vs. Cole*, 354.
  30. An ejectment cannot be supported by the executrix of a will for the recovery of leasehold property bequeathed by the will to the defendant, if the executrix is proved to have assented to such bequest. *Ibid.*
- See EVIDENCE.  
 DEPOSITION.  
 TRESPASS.  
 LAW AND FACT.  
 PRACTICE.

**WIT.**

1. One of the representatives of a deceased person may support a bill in equity against the administrator for his share of the intestate's estate. *Conway vs. Green*, 99.

EQUITY.—*Continued.*

2. Bill for an account by surviving partners against the executor of a deceased partner. *Yates vs. Petty*, 39.
3. The Court of Chancery will compel the performance of a parol agreement, admitted by the parties to have been made or clearly proved to have been made and partly carried into effect. *Worley vs. Walling*, 185.
4. But it will not compel a conveyance, where a parent, long before the marriage of a child, promised if the child was dutiful, and married with the parent's consent, that upon such marriage he would convey a tract of land to the child, unless such promise was renewed anterior to such marriage, even though after such marriage the child was put in possession of a part of the land, and erected some improvements thereon. *Ibid.*
5. The defendant executed in 1782, a bond conditioned to convey certain land to the complainant. On a bill filed in 1798, for a specific performance of the contract, equity refused to enforce the same, but remitted the complainant to his remedy at law on the bond. *Beall vs. Prather*, 137.
6. A contract must in all respects be full, fair and honest, in the beginning, and the performance of it fairly and conscientiously required, or the Court of Chancery will not enforce it. *Carberry vs. Tannehill*, 141.
7. If two persons agree about the purchase and sale of land, the quantity of which is understood by each to be 300 acres, but from a real mistake of the scrivener, only 200 acres are conveyed, and the mistake is discovered, and both parties are apprised that there are in the tract 400 instead of 300 acres, on which quantity the price had been fixed, the Court of Chancery will not decree the surplus 100 acres; and there being circumstances proving the bargain a hard one, it will not enforce the contract as to the other 100 acres. *Ibid.*
8. To a bill filed by a legatee against executors for payment of a legacy, bequeathed to be paid out of the personal estate, if sufficient, if not, then out of the proceeds of certain lands to be sold, there was a demurrer stating that the personal estate being insufficient, lands were directed by Act of Assembly to be sold, and other persons, with the executors, were named as trustees to make the sale, &c. and who are not made parties. Demurrer overruled, and defendants directed to answer. They answer, that the personal estate, and that part of the real estate sold, were insufficient to pay the debts and legacies; and an account directed to be stated at the instance of complainants. *Scott vs. Dorsey*, 143.
9. The auditor, in stating an account on such a bill, is not concluded by an allowance made to the executors by the Orphans' Court in an account settled there; but where the articles allowed by the Orphans' Court were proper to be allowed, equity will not require any further evidence in regard to them, than the production of the account passed by the Orphans' Court. *Scott vs. Dorsey*, 143.
10. On an application to chancery to vacate a grant of land on account of fraud, &c. if not for the benefit of the State, the vacating of it will depend on the equitable circumstances to be established in favor of the relator. *Attorney-General vs. Snowden*, 200.

EQUITY.—*Continued.*

11. Where a Court of equity decrees a conveyance from the defendant to the complainant, and on the service of a copy of the decree, under seal, with the tender of a deed in pursuance of the decree, the defendant refuses to deliver up possession, and to execute the deed, a writ of injunction to compel delivery of the possession, may be issued.
12. Form of such writ.
13. If that writ be not obeyed, the Court will grant an *habere facias possessionem*.  
Form of such writ. *Garretson vs. Cole*, 227.
14. A Court of equity will carry into execution what appears to have been a kind of family compact for settling their property on a fair and reasonable footing. *Browne vs. Browne*, 268.
15. Where the consideration of natural love and affection was held to be such a consideration as entitled a grantee to the aid of a Court of equity to supply the defect in a defective conveyance to convey land, although such consideration was not expressed in the conveyance. *Ibid.*
16. A father being seised of considerable real estate agrees not to devise it, but let it descend to his eldest son and heir at law, with an understanding and agreement with such son, that should he (the son) afterwards get title to another estate, then belonging to a third person whose devisee he expected to be, that he would then convey the estate so descended to him from his father, to his younger brothers. If after the father's death the son does get title to the estate of such third person, and executes, in pursuance of said agreement with his father, a conveyance to his brothers of the estate descended from his father, which conveyance proves to be defective, equity will remedy such defect. *Ibid.*
17. Equity will not enjoin the execution of a judgment in ejectment rendered for a mortgagee against a mortgagor, upon the ground that a part of the mortgage debt was paid, &c. until the plaintiff in the ejectment has been summoned and heard. *Todd vs. Pratt*, 284.
18. Where there is a deficiency of assets in the hands of an executor or administrator, the Court of Chancery will decree a sale of the real estate devolving on the heir, &c. of full age. *Tyson vs. Hollingsworth*, 286.
19. Where a complainant in Chancery had obtained a decree establishing his right to the profits of a ferry—on another bill for subsequent profits, he referred to such decree, without exhibiting a record thereof, and obtained a decree, &c. which on appeal was reversed, although the defendant's answer admitted the former decree, &c. *Norwood vs. Norwood*, 323.
20. The Court of Chancery has full power to decide all questions of law and fact which arise in that Court. *Hilleary vs. Crow*, 337.
21. The practice of referring such questions to a Court of law and a jury, originated in the superiority of the trial by jury, but can be dispensed with in the discretion of the Court of Chancery. *Ibid.*
22. Where the matter in dispute is small, such reference should not be made, but everything should be decided by the Court of Chancery in the first instance. *Ibid.*

EQUITY.—*Continued.*

23. Where the defendant has agreed to convey to the complainant a tract of land, and to give him possession on a certain day, and takes the complainant's bond for the purchase money, and he afterwards sues on the bond, and gets a judgment, the Court of Chancery will enjoin such judgment and compel him to make allowance to the complainant for the value of such part of the land as he may fail to give possession of at the time agreed on, from such time until possession be in fact given. *Ibid.*
24. General exceptions to the auditor's report ought not to be made. Every exception ought to point out a particular error. *Scrivener vs. Scrivener*, 422.

See BILL OF EXCEPTIONS, 1.

## ESTATE TAIL.

A tenant in tail may mortgage the entailed lands and thereby dock the entail. *Todd vs. Pratt*, 284.

## EVIDENCE.

1. Depositions not appearing on their face to have been taken according to notice, both as to time and place, cannot be given in evidence, and evidence is not admissible to prove that they were in fact taken according to the notice. *Collins vs. Elliott*, 1.
2. A land commission under the Act of 1723, ch. 8, and depositions taken thereunder, not received in evidence, it not appearing that the specific notices required by that Act had been given. *Gittings vs. Hall*, 11.
3. On the execution of a commission to take the depositions of witnesses, in answer to one of the interrogatories, a witness stated that in his opinion his deposition taken at another time contained his knowledge, &c. Which deposition was set forth by the commissioners—*Held*, that it was incompetent, and could not be read in evidence. *Sterenson vs. Myers*, 62.
4. To prove that a person offered as a witness was interested in the event of the cause, evidence was offered to prove that he had declared that he was interested, &c. *Held*, that the evidence was admissible to impeach the competency of the person offered as a witness. *Colston vs. Nicols*, 65.
5. The Register of the Land Office examined as a witness as to the loss of records of his office, and as to certain practices which prevailed therein, prior to the Revolution. *Hall vs. Gough*, 77.
6. Where a record was removed from a County Court to the General Court, by the defendant on a writ of *certiorari*, it was held that the defendant could not object to the reading in evidence of the record by the plaintiff, on the ground that the seal of the County Court had not been affixed to the same. *Ridgely vs. Norwood*, 83.
7. A surety in a testamentary bond is not a competent witness in behalf of the executor in a suit by the executor. *Bean vs. Jenkins*, 88.
8. A conveyance for a moiety of the land for which an action of trespass *q. c. f.* is brought, permitted to be read in evidence, before it was proved that the grantor therein had a right to convey. The Court will direct the jury, in case it is not afterwards shewn that he had such right, that such conveyance is not evidence. *Lowes vs. Holbrook*, 101.



EVIDENCE.—*Continued.*

9. A witness cannot declare in evidence anything which was taken down in writing, as the deposition of a witness sworn before him, as a commissioner to mark and bound lands, inasmuch as the deposition itself would be better evidence. *Ibid.*
10. A verdict may be given in evidence to have its weight with the jury, but it is not conclusive evidence. *Lowes vs. Holbrook*, 101.
11. Ancient bonds of conveyance admitted in evidence upon proof of the hand-writing of the deceased witness thereto. *Carroll vs. Norwood*, 108.
12. Deeds are acknowledged and recorded only by virtue of the Act of Assembly; and a copy of a deed not required by law to be recorded is inadmissible in evidence. *Ibid.*
13. When a deed has not been recorded within the time limited by law, a copy thereof is not admissible as proof of the original deed. *Ibid.*
14. The record of an ancient deed, which appeared not to have been signed by the grantor, but which was acknowledged by him, admitted in evidence. *Ibid.*
15. Where A. has been in possession of land, for upwards of forty years, under a deed to him from B. a copy of an ancient deed, not enrolled in time, from C. to B. for the same land, though misrecited in the deed from B. to A. with the rent roll, entries, &c. are evidence sufficient for the jury to presume and find a deed from C. to B. *Ibid.*
16. A copy of a deed, not enrolled in time, made by a clerk under his seal of office, is entitled to no more credit than a copy taken by a private person. *Ibid.*
17. Where there is no ambiguity on the face of the grant, as to the location of certain lines, no evidence *de hors* is admissible. *Dorsey vs. Hammond*, 126.
18. The opinions of learned counsel, taken before bringing the action, cannot be read to the jury for any purpose. *Ibid.*
19. Parol evidence cannot be given to prove the non-payment of the consideration money for lands sold and conveyed, the deed expressing that the consideration had been received. *Dixon vs. Swiggett*, 162.
20. A verdict in a former suit where the judgment was reversed for error in fact, is not evidence in a trial on a new ejectment. *Richardson vs. Parsons*, 163.
21. A record in an action of trespass *q. c. f.* between parties under whom the plaintiff and defendant in ejectment claim, read in evidence, &c. *Gibson vs. Smith*, 163.
22. A land commission defectively executed, may be read in evidence to prove the commission had issued, but for no other purpose. *Ibid.*
23. The deposition of a witness taken under a land commission legally executed, cannot be read in evidence unless there is proof of the death of the witness. *Davis vs. Batty*, 166.
24. The deposition of a witness taken upon a survey of the land made under a warrant issued in a former ejectment, between persons under whom the present parties claim, not permitted to be read in evidence in a new ejectment, although the witness was a non-resident of the State, and upwards of 80 years of age, due diligence not having been used to procure the attendance of the witness.

EVIDENCE.—*Continued.*

Under what circumstances such a deposition may be read in evidence.  
*Darnall vs. Goodwin*, 178.

25. Where an agreement has been admitted in evidence, without objection, a subsequent agreement to the same effect, endorsed on the said agreement, permitted to be read also. *Clarke vs. Ray*, 189.
26. Proof of the hand-writing of the witness to an instrument of writing, who is dead, is sufficient evidence of its execution, without proving the hand-writing of the party to it. *Parker vs. Fassitt*, 204.
27. Parol evidence inadmissible to prove that a surveyor never did survey the land included in a certificate of survey, until after a grant had issued. *Webb vs. Beard*, 211.
28. The general reputation and tradition in a family of the death of one of its members, and of his having died seized of real estate, is evidence of those facts, even in an action of ejectment for such estate by another of the same family claiming under the deceased. *Pancoast vs. Addison*, 212.
29. The deposition of a witness that she had heard her father, and others of the family, now dead, say that her grandfather and his brother had emigrated from England: that before they emigrated, their younger brother, who was an apprentice, had been kidnapped in London and brought to Maryland, and that he had been sold by the captain of the vessel to some gentleman in Maryland, &c. was held to be admissible in evidence to prove relationship, as part of a chain of evidence. *Ibid.*
30. Hearsay, derived from a person who was then heir at law, and claimed the land for which the ejectment is brought, admitted as legal and competent evidence for the plaintiff in such action to prove pedigree, descent, &c. *Ibid.*
31. A second husband, surviving his wife who was administratrix of her first husband, is a competent witness for her surety in an action on the administration bond. *Wallis vs. Britton*, 293.
32. Where in an action of assault and battery, the defendant pleads *son assault demesne*, the plaintiff can give no evidence of an assault except on the day laid in the declaration, and this, whether the defendant gives evidence in support of his plea or not. *Gibson vs. Fleming*, 297.
33. Where there was sufficient evidence for the jury to presume that the lands mentioned in a deed to lead the uses for suffering a common recovery and the lands mentioned in the said recovery were the same; and that a resurvey made of certain tracts of land contained no more land than was included in the original surveys. *Hackins vs. Burress*, 316.
34. If after a witness is sworn on the *voir dire*, it appears from his own testimony on his examination-in-chief, that he is interested, his testimony may be rejected. *Cole vs. Cole*, 354.
35. But if his interest appears only from the evidence of the other witnesses, his testimony cannot be rejected. *Ibid.*
36. Where a witness is objected to on the ground of his having been transported to this country to serve seven years on a conviction of felony, the party objecting must prove that such witness did not serve out the seven years, otherwise, he becomes a competent witness. *Ibid.*

## EVIDENCE.—Continued.

See ACCOUNT.

BILL OF SALE.

CONTRACT.

DEED.

DEPOSITION.

EJECTMENT.

TRESPASS.

WILLS.

## EXCHANGE.

1. The changing of a sterling money debt into currency, at 170 exchange, is equitable and proper.
2. When a sterling money debt is changed into currency, 6 per cent interest is to be allowed.
3. A draft for sterling money is to be credited at the rate of exchange at the time of the draft. *Pearce vs. Wallace*, 38.

## EXECUTION.

1. A *fi. fa.* issued by a Justice of the Peace on a judgment recovered on warrant held to be void for the want of a return day. *West vs. Hughes*, 5.
2. A judgment against an executor, &c. "to bind assets which are or have been in hand," &c. is nothing more than a judgment, when assets, and a *fi. fa.* cannot issue thereon until after a *fiat* on a *sci. fa.* suggesting assets, &c. *The State vs. Goldsmith*, 61.
3. Where a sheriff's return on a *feri facias*, and his conveyance of the land sold under it, are apparently regular, the title cannot be divested out of the purchaser, except by proof of fraud or collusion between him and the sheriff. *Bull vs. Sheredine*, 249.
4. Land taken under a *feri facias* must be specially described; otherwise the seizure is void, and the execution will, on motion, be quashed. *Williamson vs. Perkins*, 273.
5. Where the schedule returned with a *feri facias* described the property seized under the writ as follows: "dwelling house, grist-mill, saw-mill, and fulling-mill, and all other buildings belonging thereunto, with one hundred acres of land joining the said property," it was held that the description was insufficient and the return was quashed. *Ibid.*
6. Where a writ of *venditioni exponas* was countermanded by the plaintiff, and on the writ was an endorsement by the plaintiff, acknowledging the receipt from A. of the balance due upon the judgment, and assigning his interest in the same to A., and the writ was renewed at a subsequent term, endorsed to the use of A., it was held that the endorsement by way of assignment was an acknowledgment of satisfaction by the plaintiff from the defendant through A., and the renewed writ and the return were quashed. *Ibid.*
7. If after a judgment has been rendered against a defendant, he sells and conveys his lands *bona fide*, and for a valuable consideration, a writ of *feri facias* cannot afterwards be laid thereon, although twelve months and a day had not expired, unless a *scire facias* had been sued out upon the judgment, and notice given to the vendee, as terre-tenant. *Arnott vs. Nicolls*, 288.

EXECUTION.—*Continued.*

8. On a motion to quash the return to such a *feri facias*, as much and more may be inquired into as in an action of ejectment, the Court having an equitable control. *Ibid.*
9. Under the Statute of 5 Geo. II, ch. 7, lands are made liable to the payment of debts, in like manner as personal estate. By the Statute of 29 Car. II, ch. 3, s. 16, a *feri facias* against personal estate, first delivered to the sheriff, will have the preference; and as that statute makes no difference, except as to purchasers, a *feri facias* against lands, &c. remains as a *feri facias* against personal estate at common law, and that which is first delivered will have the preference, and shall be first satisfied. *Ibid.*
10. After a *feri facias* has been laid, and before a sale of the property seized thereunder, a writ of error, bond with security having been approved, operates as a *supersedeas* to stay further proceedings under the *feri facias*. *State vs. Page*, 290.
11. The defendant, and not the plaintiff, is answerable for the poundage fees on executions. *Howard vs. Levy Court*, 347.
12. If property is taken under a *fi. fa.* and the plaintiff and defendant compromise, the sheriff may sell to the amount of his poundage fees. *Ibid.*
13. Where there are several executions against several defendants for the same debt, the sheriff is entitled to poundage fees only on the sum really due. *Ibid.*
14. Where executions go to different counties on either a joint judgment or on several judgments for the same debt, the sheriffs of such counties must divide amongst them the poundage fee on the real debt. *Ibid.*

## EXECUTORS AND ADMINISTRATORS.

1. A representative of a decedent may maintain a bill in equity against the administrator for his share of the intestate's estate. *Courcy vs. Green*, 99.
2. An administrator or executor cannot purchase at his own sale. *Ibid.* The Orphans' Court having ratified such sale, does not preclude the Court of Chancery from setting it aside. *Ibid.*
3. Executors are not allowed interest on debts by them paid after the testator has been more than twelve months dead. *Scott vs. Dorsey*, 143.
4. Executors are entitled to be credited with the amount of any fair judgment or decree against them, although they may have appealed therefrom. *Ibid.*
5. As to the time when interest on a legacy, and the balance in the hands of the executors shall commence. *Ibid.*
6. The executors are accountable for money received by them from the sale of real estate of the testator, which was charged with the payment of legacies, where the executors and others were appointed, by an Act of Assembly, trustees to make the sale. *Ibid.*
7. The executors are entitled to an allowance for the thirds of the widow of the testator, she having renounced the will, and also for the full amount of the specific legacies, whether paid or not, which legacies are to be credited at the amount of the appraisement. *Ibid.*

EXECUTORS AND ADMINISTRATORS.—*Continued.*

8. Executors are not to be allowed for articles furnished for the support of the family of the deceased. *Ibid.*
9. It is the province of the Orphans' Court to determine on an allowance of extra commission to executors for extraordinary trouble. *Ibid.*
10. Executors who received continental paper money, in payment of property sold by them, are to be charged with it according to its proper value in current money. *Ibid.*
11. Where an administrator gives judgment by confession, which is afterwards reversed, he is not precluded from shewing afterwards the want of assets at that time. *Green vs. Stone*, 247.
12. When an administrator has failed to return in his inventory a part of the personal estate of his intestate, limitations cannot be set up as a defence to a bill by a personal representative of the intestate against the executor of the administrator. *Scrivener vs. Scrivener*, 422.

See ASSUMPSIT, 1.

EQUITY.

GUARDIAN.

JUDGMENT.

LIMITATIONS.

FIXTURES.

Where a lot of ground and still-house thereon were sold under a *fiery facias*, it was *Held*, that the pumps, cisterns, iron grating and door, distillery and horse-mills passed to the purchaser, but not the joists, vats, buckets, pickets and fossits, which were not fixed to the freehold.

Such a sale is to be considered as a case between vendor and vendee, which is different from that of landlord and tenant. In the latter case the tenant is allowed to remove many things which may be considered as fixed. This is for the benefit of trade, and where a tenant puts up any thing for the purpose of carrying on his trade, he may remove it. *Kirwan vs. Latour*, 175.

GRANTS.

1. Where a grant of a tract of land operated by relation from the date of the certificate of survey, and vested the legal title in the land in the grantee on the day of the survey. *West vs. Hughes*, 5.
2. The person to whom a special warrant of resurvey is issued, and his assigns, acquire an equitable interest in the vacant land contiguous to the land described in the warrant, and a patent issued on such warrant relates to the date thereof as to such contiguous vacancy; but no title is acquired by such warrant and patent to vacant land separated from the original tract by an elder survey, and included in another grant, subsequent to the date of the said warrant. *Howard vs. Cromwell*, 73.
3. The jury was instructed that they ought to presume that a patent was regularly issued, there having been a certificate of survey returned, and sundry conveyances and long possession by persons claiming thereunder. *Hall vs. Gough*, 77.
4. The lines of an elder survey prevail over those of a junior. *Dorsey vs. Hammond*, 126.

GRANTS.—*Continued.*

5. The description of a tract of land in a grant held to be ambiguous and the location left to the jury. *Davis vs. Balty*, 168.
6. The relation of a grant to the certificate of survey so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law. *Ringgold vs. Malott*, 184.
7. An attempt to take up land within the proprietary's reserve was a fraud, and no equitable interest was acquired in the land so taken up. *Ibid.*
8. The State stands in the place of the proprietary as to all lands belonging to him at the time of the Act of confiscation. *Ibid.*
9. The contract of the Proprietary with a person taking up land under a proclamation warrant was nothing more than this: whatever land you shall survey under the warrant, without violating the rules of my land office, shall be patented to you, provided you shall pay me for it within two years from the date of the warrant. *Attorney-General vs. Snowden*, 200.
10. Where a party holds land under a patent which, on proper application may be vacated, another party, who subsequently obtains a proclamation warrant and lays it on the same land, has no right to question such grant. *Ibid.*
11. A proclinator of land does not stand, to all intents and purposes, in the place of the original taker of the land. He is not a party or privy to the original contract for the land. *Ibid.*
12. A grant under a proclamation warrant does not relate to the original grant. *Ibid.*
13. The proper location of the land described in particular grants considered. *Gibson vs. Smith*, 163. *Kirkpatrick vs. Kyger*, 182. *Thompson vs. Brown*, 202.
14. Relation of a grant to the certificate of survey, so as to overreach a prior grant for the same land, refused, the certificate not having been returned, nor the composition paid within the time limited by the rules of the land office. *Beall vs. Beall*, 210.
15. If the surveyor at the time of surveying a junior tract of land, run the elder adjoining tracts without regard to the calls therein, or correcting the variation, then to ascertain the beginning of the junior tract at any future period, the elder tracts must be run without regard to the calls therein, or any allowance for variation. *Webb vs. Beard*, 211.
16. Parol evidence is not admissible to prove that the surveyor never did actually run out or survey the land included in a certificate of survey returned by him, until after a grant had issued thereon. *Ibid.*
17. If a patent be obtained fraudulently, or contrary to the rules of the land office, it is voidable or void in a Court of law, as well as in a Court of equity—and if suit be first brought at law, in which the validity of such patent might be tried, equity will not afterwards interfere. *Garretson vs. Cole*, 227.
18. A patent issued by the Judge of the land office under a presumption that only certain lands are included in it, is good for so much of the said lands as are properly included. *Jarrett vs. West*, 308.

See EJECTMENT.

GUARDIAN AND WARD.

1. A father is the natural guardian of his children. *Smith vs. Williamson*, 97.
2. A guardian has no right to retain money received by him from the executor unless the executor has passed a final account with the Orphans' Court, and an order had been passed by that Court to pay over such money to the guardian. *Wilson vs. Boyer*, 182.

See REPLEVIN.

HEIR AT LAW.

See ASSUMPSIT.

INSOLVENCY.

1. A defendant, taken in execution on a *ca. sa.* was discharged on his producing his release under an insolvent law of another State. *McKim vs. Marshall*, 62.
2. Bail discharged on evidence being produced of the release of the principal under the insolvent law of another State. *Ibid.*
3. An action may be maintained, in the name of an insolvent debtor, for property belonging to him before his discharge, unless a trustee has been appointed who has accepted the trust, and to whom a deed has been executed. *Kirwan vs. Latour*, 175.
4. As to when a debtor within the purview of the bankrupt law of the U. S. may avail himself of a State insolvent law. *Clarke vs. Ray*, 189.
5. Conveyances made to particular creditors in contemplation of insolvency—Held to be "undue and improper preferences," and therefore void under the Act of 1800, ch. 44, for the benefit of sundry insolvent debtors. *Manro vs. Gittings*, 302.

INSURANCE.

The shipper, when he effects insurance, and holds the policy, in case of loss must first have recourse to the underwriters before he can claim from the owner. *Gray vs. Swan*, 94.

INTEREST.

1. If a sum of money is paid in part of a debt due on bond, &c. carrying interest, before the expiration of the year, such payment is to be deducted from the interest then due, and the residue, if any, from the principal; and the balance thus ascertained, decreed to be paid with interest thereon until paid. *Lamott et al. vs. Sterett*, 29.
2. It is within the discretion of the Court of Appeals to give interest by way of additional damages. *Contee vs. Findley*, 199.
3. On a judgment founded on a verdict for damages including interest, the Court of Appeals will permit interest to be calculated thereon from the date of the judgment until its affirmance in such Court, and award the same by way of additional damages. *Ibid.*
4. Where the Court of Appeals affirms a judgment of the Court below, without awarding interest by way of additional damages, in an action on the appeal or writ of error bond, interest can be recovered only from the time of the affirmance. *Butcher vs. Norwood*, 298.
5. On the affirmance of a judgment rendered in the Court below in an action of assault and battery, interest by way of additional damages may be awarded. *Ibid.*

See PAYMENT.

## JUDGMENT.

1. A judgment which is for any cause reversed, can have no legal effect whatever. *Green vs. Stone*, 247.
2. Under the Act of 1778, c. 21, no agreement for the stay of execution on a judgment, which is not entered on the docket at the time the judgment is rendered, can make it unnecessary to issue a *sci. fa.* to revive the judgment when a year and a day has passed from the time such judgment was rendered. *Salmon vs. Yates*, 300.
8. Every judgment for money carries interest from its date, unless the terms agreed on provide otherwise, or the nature of the judgment prohibits it. *Gwinn vs. Whitaker*, 429.
4. The interest on a judgment may be levied under an execution on the judgment as well as the principal. *Ibid.*
5. In debt on a judgment bearing interest, the jury must assess damages equal to the interest. *Ibid.*

See ADMIRALTY.

ASSUMPSIT.

INTEREST.

PAYMENT.

## JURISDICTION.

The County Court has jurisdiction in an action of *assumpsit* for not delivering a sufficient quantity of superfine flour, produced from the plaintiff's wheat, sent to be ground at the defendant's mill, although the damages recovered were less than 10*l.* *Bruner vs. Hedges*, 134.

## LAND COMMISSION.

See DEPOSITION.

## LANDLORD AND TENANT.

1. A distress for rent in arrear, to be lawful, must be made agreeably to the statute of 2 W. & M. c. 5. *Garrett vs. Hughlett*, 8.
2. A lessor is entitled to the rent of the demised premises, although during the term they were destroyed by fire, and although, after the fire, he entered upon the premises, and took possession of sundry articles. *Lamott vs. Sterett*, 29.

## LAND OFFICE.

1. The opinion of the Judge of the land office is not conclusive. *Ringgold vs. Malott*, 184.
2. The decisions of the Chancellor as Judge of the land office, are not conclusive, but may be reviewed in the Court of Chancery by original bill. *West vs. Jarrett*, 834.

See GRANT.

## LAW AND FACT.

1. It is the province of the jury to determine, from the evidence, the true location of the tracts of land in dispute, and whether there was any vacancy between the same. *Howard vs. Cromwell*, 73.
2. It is the province of the jury, to determine whether any allowance be made for the variation of the compass, and the rate or rule of such allowance. *Ibid.*
3. It is for the jury to determine whether the descriptive expressions in a grant of land are binding or not. *Ridgely vs. Norwood*, 83.



LAW AND FACT.—*Continued.*

4. In all cases of ambiguity, arising on the face of a grant, as to the location of the land, the jury is the proper tribunal to decide the fact of location, which may well be ascertained in such cases by evidence *de hors* the grant. *Dorsey vs. Hammond*, 126.
5. The time when a manor was laid out is a matter of fact for the jury, there being no record thereof to be found. *Ringgold vs. Malott*, 184.
6. The General Court has a concurrent jurisdiction with the Judge of the land office, as to the extent and operation of interfering grants; and it is the peculiar province of the jury to decide facts. *Ibid.*
7. The Court decides on the competency of evidence and not on the effect of it. *Harper vs. Hampton*, 374.

LEGACY

See WILLS.

LIEN.

See VENDOR AND PURCHASER.

LIMITATIONS.

1. The Lord Proprietary had not the royal rights of the King of England, and he might be barred by the Act of Limitations and adverse possession of lands, which he claimed by escheat, &c. *Russell vs. Baker*, 45.
2. The Act of Limitations is a bar to an action brought within one year after a former action had been struck off. *Cawood vs. Whetcroft*, 63.
3. The Act of Limitations need not be pleaded to each distinct count in a declaration containing several counts upon several distinct causes of action. *Bullen vs. Ridgely*, 64.
4. The Act of Limitations does not begin to operate until the expiration of the time limited for the payment of the money secured to be paid by the bond, &c. *Glasgow vs. Porter*, 68.
5. Where an administrator files as an exhibit in a Chancery suit, an account against his intestate in favor of A. it is a sufficient acknowledgment of such account to prevent the operation of the Statute of Limitations, and one who is the attorney of both the administrator and A. is competent to prove that the administrator directed such account to be used as an exhibit, and insisted on in such suit. *Forbes vs. Perrie*, 68.
6. Where F. in January, 1796, got possession of property claimed by P. and in March, '96, P. brought trover against F. which action abated in the same year by the death of F. and no administration was granted on F's estate until January, 1799, and in February, '99, P's executors brought assumpsit against F's executors for the value of the property, it was held that the Statute of Limitations was not a bar to the suit. *Parker vs. Fossitt*, 204.
7. A non-resident of the State, but who is a resident of one of the United States, is not barred by the Statute of Limitations in an action of ejectment. *Pancoast vs. Addison*, 212.

See REPLEVIN.

MANDAMUS.

1. A mandamus cannot issue to compel a levy Court to levy a sum of money after the time for making it has passed. *Ellicott vs. Levy Court*, 219.

PRACTICE.—*Continued.*

7. The County Court refused to receive the plaintiffs' declaration at the fourth term, and to lay a rule on the defendant to plead at that or the succeeding term, and wholly refused to continue the cause; on appeal, reversed. *Briscoe et al. vs. Ward*, 107.
8. Can a writ of *procedendo* be awarded in any case except where there has been a jury trial, and a reversal on a bill of exceptions? *Ibid.*
9. A plea of payment may be withdrawn at the trial Court for the purpose of pleading infancy. *Somervell et al. vs. King*, 133.
10. Proceedings stayed in an action of ejectment, unless the costs recovered in a former ejectment between the same parties, are paid. *Bull vs. Sheredine*, 134.
11. The allowance for the attendance of a witness, who was *subpoenaed*, but not sworn at the trial, is not to be taxed in the costs, unless directed by the Court, on application. *Davis vs. Batty*, 168.
12. If one party gets a commission to take testimony on the terms that whether it be returned or not, the cause shall not, on that account, be continued at the ensuing term; yet if it be returned executed at the ensuing term, the adverse party has a right to a continuance till he has time to examine the testimony, that he may have an opportunity of disproving it if he thinks necessary. *Norwood vs. Owings*, 181.
13. On paying costs, a party may amend from assumpsit to trover. *Kirwin vs. Raborg*, 181.
14. A cause re-instated, after having been decided, in pursuance of an Act of Assembly. *Garretson vs. Cole*, 227.
15. Notwithstanding notice of trial, a continuance of the action will be granted to the defendant on suggestion of the existence of a bill in Chancery by him against the plaintiff, for a discovery of facts material in the trial of the action, and that due diligence had been used to obtain the plaintiff's answer. *Ridgley vs. Campbell*, 276.
16. Where there are issues in fact and in law, the last shall be tried first. *Harper vs. Hampton*, 277.
17. Where a rule of Court authorizes, under circumstances, a continuance of a cause on the suggestion of either party, without costs, those circumstances must be proved, otherwise than by such party's oath. *Middleton vs. Edelen*, 281.
18. A general demurrer, or any plea going to the merits, will be received at any time to save a *non pros*. *Contee vs. Beall*, 298.
19. A party has a right to a continuance of the action when testimony obtained under a commission returned at the present term is about to be used by the opposite party. *Harper vs. Hampton*, 374.
20. The tender of a bond of indemnity, after action brought, is insufficient when indemnity is necessary to the plaintiff's recovery. *Ibid.*
21. The plea of payment to an action of debt on a bond cannot be withdrawn to plead *nū debet*. It may be to plead *non est factum*, on the payment of costs. *Williams vs. Williams*, 428.

See BILL OF EXCEPTION, 2.

## PRESUMPTION.

See GRANT.

EJECTMENT.

**PRIORITY.**

1. Where the State and an individual have judgments against a deceased person, in the payment of the debts of the deceased by his executor, the judgment by the State has a preference, and is to be paid first. *Contee vs. Chew*, 254.
2. Under the Act of March, 1778, ch. 9, s. 6, as soon as a suit is commenced by the State, a lien is created on the lands of the debtor, and the State acquires a right of preference over the other creditors who had not, prior to the commencement of the suit by the State, secured a lien by judgment, mortgage, or otherwise. *Davidson vs. Clayland*, 340.
3. If such lands be sold by a sheriff under a *fiery facias*, issued on a prior judgment and lien, the surplus of the money arising from the sale after satisfying such prior lien, remaining in the hands of the sheriff, is to be considered as land and subject to an attachment issued by the State on its judgment, in preference to a prior attachment issued by a private creditor on a judgment rendered at the same term. *Ibid.*

**PROBATE OF ACCOUNTS.**

See ACCOUNT.

**RELATION.**

See GRANT.

**REPLEVIN.**

1. Right of possession only, is necessary to support an action of replevin. *Smith vs. Williamson*, 97.
2. A father is the natural guardian of his children, and where they have no other guardian, may maintain replevin for their personal property. *Ibid.*
3. This he may do, though the children be females, and upwards of sixteen and under twenty-one years of age, at the time the property is taken from them, or at the institution of the suit. *Ibid.*
4. Limitations in replevin cannot be taken advantage of unless pleaded. *Ibid.*
5. In an action of debt on a replevin bond, where general performance was pleaded, the replication stated that a writ of replevin had been prosecuted, &c. and that a judgment was rendered *de retorno habendo*, &c. After a judgment by default against the defendant, there being no rejoinder to the replication, there was a writ of inquiry to assess damages, when the plaintiff offered to read from the record over of the replevin bond upon which the suit was brought, to which the defendant objected. *Held*, that the original bond need not be produced, but that it might be read from the record. *Reid vs. Wethered*, 273.

See ABATEMENT.

**SHERIFF.**

1. A sheriff cannot maintain an action for officers' fees placed in his hands for collection, unless he has paid the amount to the officer to whom they were due. *Goldsmith vs. Pattison*, 133.
2. An attachment may be had against a sheriff for not returning a writ. *West vs. Hughes*, 276.

**SLANDER.**

Proof of words spoken in the second person, will not support a declaration in an action of slander laying them in the third person. *Wolf vs. Rodifer*, 249.

**SLAVES.**

1. A master, in order to retain the services of his slave who has petitioned for his freedom, must enter into the usual recognizance for suffering the petitioner to prosecute his petition, &c. *Jenings vs. Higgins*, 208.
2. If a petitioner for freedom obtains a judgment in his favor, which is afterwards reversed on appeal, his master cannot recover the value of his services from a person who may have hired him between the time of the first judgment, and that of its being reversed, unless he has given bond to prosecute the appeal. *Ibid.*
3. And if he does give such bond it seems he will have a right to keep such petitioner in his possession pending the appeal. *Ibid.*
4. The issue or increase of female slaves, born during the life of a legatee for life, is the property of the representatives of such legatee. *Standiford vs. Amoss*, 324.

**SPECIFIC PERFORMANCE.**

*See* EQUITY.

**STATUTES.**

1. The title and preamble of an Act of Assembly are never resorted to in expounding it, to ascertain the meaning of the Legislature, where the words in the enacting clause are explicit. *Davidson vs. Clayland*, 340.
2. The Statute of 21 James I, ch. 16, has been adopted by the Courts of Maryland as applicable, &c.  
The words "beyond seas," in the saving of the Statute of 21 James I, ch. 16, are synonymous with out of the jurisdiction of the State. *Pancoast vs. Addison*, 212.
3. The Statute of 32 Henry VIII, ch. 2, s. 2, respecting dormant titles, does not extend to this State, nor has it been adopted or introduced therein by any decision. *Ibid.*
4. Statute of 2 W. & M. c. 5. *Garrett vs. Hughlett*, 3.
5. Statute of 5 Geo. II, c. 7. *Arnot vs. Nichols*, 288.
6. Act of 1715, c. 45. *Davis vs. Batty*, 168.  
1715, c. 47. *Corporation vs. Hammond*, 360.  
1723, c. 8. *Gittings vs. Hall*, 11.  
1729, c. 20. *Smoot vs. Bunbury*, 89.  
1763, c. 23. *Parrott vs. Gibson*, 242.  
1766, c. 21. *Hawkins vs. Burress*, 316.  
1778, c. 9. *Davidson vs. Clayland*, 340.  
1778, c. 21. *Salmon vs. Yates*, 800.  
1792, c. 55. *Corporation vs. Hammond*, 360.  
1800, c. 44. *Manro vs. Gittings*, 302.  
1801, c. 74. *Whittington vs. Polk*, 150.

**SUPERSEDEAS.**

*See* APPEAL.

**SURETY.**

The surety on a collector's bond is not answerable for a sum of money directed by an Act of Assembly to be levied at a particular time, which was not so levied. And, although the defendant had in the Court below withdrawn his plea and confessed judgment, such judgment will be reversed on writ of error. *Quynn vs. State*, 26.

See BOND.

**TAX AND COLLECTOR.**

If a sum of money is levied and collected after the time for making the levy has passed, the sureties of the collector would not be answerable in case it were not paid over. *Ellicott vs. Levy Court*, 219.

See MANDAMUS.

**TRESPASS.**

1. Trespass will not lie by a master for an assault and battery on his slave, unless it be attended with a loss of service. *Cornfute vs. Dale*, 4.
2. The plaintiff to recover in an action of trespass must show title or that he was in the actual possession of the place where, &c. when, &c. *Norwood vs. Shipley*, 180.
3. In an action of trespass for mesne profits, the plaintiff recovers damages only for the use and occupation of the land, and not for trespasses committed during the same period. *Gill vs. Cole*, 245.
4. A recovery therefore in such action is no bar to an action of trespass *q. c. f. Ibid.*
5. The moving of fence rails is a trespass, for which damages may be recovered in an action of trespass *q. c. f.* notwithstanding a recovery in an action for mesne profits, unless that removal was necessary for the use and occupation of the land. *Ibid.*
6. In action of trespass to recover mesne profits, the defendant is not estopped by the judgment in the ejectment, from proving that the plaintiff was in possession of the land between the demise laid in the declaration and the judgment. *West vs. Hughes*, 356.
7. The judgment is conclusive as to the defendant's possession and the plaintiff's title, from the date of the demise to that of the judgment, and the defendant cannot shew, that in point of fact other persons had such possession, in order to free himself from an action for the mesne profits during that time, except he can shew that the possession was in the plaintiff. The judgment does not conclude him from proving that fact. *Ibid.*
8. To recover mesne profits for any time anterior to the date of the demise, the plaintiff must prove both his title then and the defendant's possession. The judgment in ejectment is proof of neither. *Ibid.*
9. In the action for mesne profits, the plaintiff can only prove by one of two ways the amount he is entitled to recover—1st. By shewing what profits have been in fact actually received; or 2d. The probable value of the land. *Ibid.*
10. If he chooses the first, he can only recover what he can shew to have been the actual receipts. If nothing was received, he can recover nothing. *Ibid.*
11. The plaintiff can recover nothing, if he has himself had the possession. *Ibid.*

See EJECTMENT.

## TROVER.

1. Whether or not a bequest to the daughter is good evidence to the jury in mitigation of damages in an action of trover by the executrix against the husband of the daughter, for the property bequeathed, if there is no proof of an assent by the executrix to such legacy. *Wilson vs. Rine*, 90.
2. If A. purchases stills of B. and pays him the purchase money, and B. afterwards takes the stills in possession, the proper remedy is trover. and A. cannot support assumpsit against B. to recover back the purchase money. *Kirwan vs. Raborg*, 181.
3. If chattels are delivered by plaintiff to defendant for sale, and he, instead of selling them, appropriates them to his own use, and refuses to account for them, the plaintiff may sustain an action of trover. *Barton vs. White*, 359.

## USURY.

Where a deed is usurious. *Hogmire vs. Chapline*, 22.

## VENDOR.

1. If a conveyance is made of land, and a bond taken for the purchase money, and the purchaser dies without having paid the purchase money, and the land is decreed to be sold for the payment of the debts of the deceased, the vendor is entitled to a preference in the payment of his debt. *White vs. Casanave*, 66.
2. In an action of debt on a bond for the purchase money of land sold and conveyed, parol evidence cannot be given by a witness that he was seized of any part of the land so sold, in order to rebut the claim and title of the vendor to any part of the land included in his deed to the vendee, or to shew that the title to any part of the land so conveyed was not in the vendor at the time of the conveyance. *Sharpe vs. Gibson*, 271.

## WARRANT OF SURVEY.

See GRANT.

## WILLS.

1. The declarations of a testator, or of the witnesses, or of the draftsman of a will, are not admissible to establish the same. *Collins et ur. Lessee vs. Elliott*, 1.  
One witness is sufficient to prove all the requisites made essential to the validity of a will by the Statute of Frauds; but where all the witnesses are dead, proof of the hand-writing of the testator and of all the witnesses is necessary. *Ibid*.
2. Whether notes, placed by a testator for collection in the hands of the husband of his daughter, were intended to be bequeathed to her under the following clause, viz. "I give and bequeath unto my daughter, all the property she has in her possession, belonging to me, of every description, at the time of my decease forever." *Held*, that it was the province of the jury to determine whether by the will and evidence in the cause, the notes were intended by the testator as the property bequeathed to his daughter. *Wilson vs. Rine*, 90.
3. A general legacy does not vest the property bequeathed in the legatee, without the assent of the executor, and the executor may maintain trover for such property against the legatee. *Ibid*.

## WILLS.—Continued.

4. A devise of a tract of land by name, and described as lying in B. County, passes the whole tract, although part of it lie in another county. *Dorsey vs. Hammond*, 126.
5. The declarations of a deceased witness to a will are not evidence of his signature. *Collins vs. Nicols*, 243.
6. Where all the witnesses to a will are dead, there must be proof of the testator's hand-writing, and of the hand-writing of all the witnesses; and where the witnesses set their marks, there must be proof that such marks were made by them. *Ibid.*
7. In the construction of wills, the intention of the testator is to prevail; but that intention must accord with the rules of law, and is to be collected from the words of the will only. *Berry vs. Berry*, 255.
8. The heir at law is not to be disinherited without express words or necessary implication. *Ibid.*
9. Where A. devised to S. "all the land I hold, or claim right to, on the W. side of a small drain that leads from the pond—also the land over said drain lying on Piney Branch, formerly called Pork Hall and Bachelor's Delight, lying in Charles County, to him and his heirs lawfully begotten of his body forever," it was *held*, that the words "lying in Charles County," constitute part of the description of the last mentioned tracts, and do not limit the operation to the first part of the devise; that the words "to him and his heirs," &c. define the estate the devisee is to have in the lands, and are as applicable to the first part of the devise as the last, and that S. took an estate tail in all the lands devised to him; and that "on the W. side of the drain," mean all the lands on the W. of a meridian N. line extended from the pond. *Ibid.*
10. Where a testator by his will had devised to his heir at law the same estate in lands which he would have had by descent—*Held*, that he took by descent and not by purchase. *Philips vs. Dashiell*, 298.
11. The record of a will not legally attested by three witnesses, is not legal and admissible evidence to prove that the testator claimed the land therein devised, and was in possession thereof, claiming title to the same. *Chaney vs. Watkins*, 325.
12. Under a devise to A. and his heirs, for ever, but in case of his death before that of the deviser, or of his (the devisee) not disposing of the property devised before his (the devisee's) death, then, with a remainder over to B. and his heirs, a disposition by A. by last will, is a disposition by him in his life-time, and as such defeats the estate in remainder. *Corporation vs. Hammond*, 360.
13. When land is devised absolutely, evidence of the acts of the deviser and devisee and other matters *de hors* is inadmissible to show that it was devised upon a secret trust; the true construction of the will depends upon the will alone. *Ibid.*

See TROVER.

## WIT OF ERROR.

1. A writ of error must be directed to the inferior Court by its proper style. *Cummings vs. State*, 206.
2. A writ of error quashed because it was not produced to, and allowed by, the inferior Court until after the return day of the writ. *Ibid.*

WRIT OF ERROR.—*Continued.*

8. A writ of error is not a *supersedeas* where the bond is not given in double the amount of the debt and costs recovered, or where the condition of such bond is, that if the plaintiff in error shall not prosecute such writ of error with effect, the bond shall not be void. *Johnson vs. Goldsborough*, 306.

See APPEAL.

CRIMINAL LAW.











# REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland,

AND IN THE

HIGH COURT OF CHANCERY OF MARYLAND,

FROM

FIRST HARRIS & McHENRY'S REPORTS TO FIRST  
MARYLAND REPORTS.

ANNOTATED BY

WILLIAM T. BRANTLY,  
OF THE BALTIMORE BAR.

VOLUME VI.

CONTAINING THE SECOND VOLUME OF HARRIS & JOHNSON'S REPORTS.

BALTIMORE:

M. CURLANDER,

LAW BOOKSELLER, PUBLISHER AND IMPORTER.

1883.

References in the notes to preceding volumes of Maryland Reports are made to the pages of this edition.

#### CORRIGENDA.

- On page 5, in the second line of the second paragraph of the syllabus, for "*from arguing*," read "*to argue*."
- On page 49, in the first line of the fourth paragraph of the syllabus, for "*mortgage*," read "*mortgagor*."
- On page 144, in the twenty-fifth line of the second paragraph of the syllabus, for "*male*," read "*female*."
- On page 298, in the first line of the syllabus, for "*or*," read "*on*."

BALTIMORE:  
WM. K. BOYLE & SON,  
PRINTERS.

## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

### OF THE COURT OF APPEALS.

- 1. JEREMIAH TOWNLEY CHASE, Chief Judge.
- 1. JAMES TILGHMAN, Judge.
- 1. WILLIAM POLK, “
- 1. JOHN BUCHANAN, “
- 1. JOSEPH HOPPER NICHOLSON, Judge.
- 1. JOHN MACKALL GANTT, “
- 1. RICHARD TILGHMAN EARLE, (a) Judge.

### OF THE COURT OF CHANCERY.

- 1. ALEXANDER CONTEE HANSON, Chancellor.
- 1. WILLIAM KILTY, (b) “

### OF THE LATE GENERAL COURT.

JEREMIAH TOWNLEY CHASE, Chief Judge.  
GABRIEL DUVALL, Judge.  
JOHN DONE, “  
RICHARD SPRIGG, (c) “

### OF THE LATE COUNTY COURTS.

#### FIRST DISTRICT.

*Saint Mary's, Calvert, Charles and Prince George's Counties.*

#### APPOINTED.

MICHAEL JENIFER STONE, Chief Justice,	17th January,	1791.
RICHARD SPRIGG,	“ “	28th January, 1802.
JOHN MACKALL GANTT,	“ “	11th February, 1803.

Appointed the 20th of May, 1809, to fill the vacancy occasioned by the  
of Judge TILGHMAN.

Appointed the 25th of January, 1806, in the place of Ch. HANSON, de-

Appointed the 29th of December, 1802, to fill the vacancy occasioned  
resignation of Judge DUVALL.

## SECOND DISTRICT.

*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. JAMES TILGHMAN, Chief Justice.	APPOINTED. 17th January, 1791.
-------------------------------------	-----------------------------------

## THIRD DISTRICT.

*Anne Arundel, Baltimore and Harford Counties.*

Hon. HENRY RIDGELY, Chief Justice,	APPOINTED. 25th November, 1796.
------------------------------------	------------------------------------

## FOURTH DISTRICT.

*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM WHITTINGTON, Chief Justice,	APPOINTED. 25th February, 1799.
Hon. WILLIAM POLK,	" " 28th January, 1802.

## FIFTH DISTRICT.

*Washington, Frederick, Montgomery and Allegany Counties.*

Hon. RICHARD POTTS, Chief Justice,	APPOINTED. 15th October, 1796.
Hon. WILLIAM CRAIK, " "	20th October, 1801.
Hon. WILLIAM CLAGGETT, " "	28th January, 1802.

## OF THE NEW COUNTY COURTS.

## FIRST JUDICIAL DISTRICT.

*Saint Mary's, Charles and Prince George's Counties.*

Hon. JOHN MACKALL GANTT, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. DANIEL CLARKE, " "

## SECOND JUDICIAL DISTRICT.

*Cecil, Kent, Queen Anne's and Talbot Counties.*

Hon. JAMES TILGHMAN, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. EDWARD WORRELL, " "
Hon. RICHARD TILGHMAN EARLE, Chief Judge. (a)

---

(a) Appointed the 20th of May, 1809, in the place of Ch. J. TILGHMAN, deceased.



NAMES OF JUDGES.—2 H. & J.

v

THIRD JUDICIAL DISTRICT.

*Calvert, Anne Arundel and Montgomery Counties.*

- on. JEREMIAH TOWNLEY CHASE, Chief Judge.  
on. HENRY RIDGELY, Associate Judge.  
on. RICHARD HALL HARWOOD, Associate Judge.

FOURTH JUDICIAL DISTRICT.

*Caroline, Dorchester, Somerset and Worcester Counties.*

- on. WILLIAM POLK, Chief Judge.  
on. JOHN DONE, Associate Judge.  
on. JAMES B. ROBBINS, " "

FIFTH JUDICIAL DISTRICT.

*Frederick, Washington and Allegany Counties.*

- on. JOHN BUCHANAN, Chief Judge.  
on. WILLIAM CLAGGETT, Associate Judge.  
on. ABRAHAM SHRIVER, " "

SIXTH JUDICIAL DISTRICT.

*Baltimore and Harford Counties.*

- on. JOSEPH HOPPER NICHOLSON, Chief Judge.  
on. THOMAS JONES, Associate Judge.  
on. ZEBULON HOLLINGSWORTH, Associate Judge.

OF THE COURT OF OYER AND TERMINER, &c.

- |                                   | APPOINTED.          |
|-----------------------------------|---------------------|
| on. WALTER DORSEY, Chief Justice. | 9th February, 1800. |
| on. JOHN SCOTT, " "               | 5th April, 1808.    |

ATTORNEYS-GENERAL.

- |                         | APPOINTED.           |
|-------------------------|----------------------|
| THOMAS MARTIN, Esquire. | 11th February, 1778. |
| WILLIAM PINKNEY, "      | 21st December, 1805. |
| HENRY THOMPSON MASON, " | 12th July, 1806.     |
| HENRY JOHNSON, "        | 18th October, 1806.  |



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REPORTED IN 2 HARRIS AND JOHNSON'S REPORT.

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# C A S E S

## ARGUED AND DETERMINED

### IN THE

# COURT OF APPEALS

### OF

## MARYLAND.

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\* COURT OF APPEALS, JUNE TERM, 1806. 1

WINCHESTER *et al.* vs. BROOKE.

B. sold and transferred to E. S. 80 shares of bank stock, and took his notes therefor. Two days thereafter E. S. became insolvent, and transferred all his property to trustees, for the benefit of his creditors. The trustees sold the stock, and received the proceeds. On a bill filed by S. B. against E. S. and the trustees, claiming to be paid the notes out of the proceeds of the sale of the stock, in preference to the other creditors, it seems that he was not entitled to such preference.

ere a preference is claimed by one of the creditors, it should appear by the proceedings, that there were other creditors whose claims are proved and allowed; also the amount of the estate and claims should appear, so as to show the proportion which the creditor, claiming the preference, is entitled to, in case he had no right to a preference.

APPEAL from a decree of the Court of Chancery. The bill, filed the present appellee, stated that Brooke, the complainant, being possessed of and entitled to 80 shares of stock in the Bank of Columbia and being desirous of disposing thereof, did, in May, 1795, make application to Solomon, one of the defendants, who at that time acted as broker in Baltimore, to sell them for him. That Solomon informed Brooke he had a commission to purchase shares in the Bank of Columbia for a gentleman in Philadelphia, and that he sold, and did purchase the shares of Brooke, for which Solomon

agreed to give, and did give to him, his promissory notes for \$2,424, the one-half payable in 26 days and the other half payable in 28 days, and the shares were transferred by Brooke to Solomon. That Solomon, in 4 or 5 days after the date of the notes, became bankrupt, and on the 18th of May, 1795, made and executed a deed of trust to Winchester, &c. the other defendants, of his effects and property, in trust, to be distributed among his creditors. That under and in virtue of the assignment, the assignees, Winchester, &c. lay claim to the

**2** 80 shares, (Solomon not having disposed thereof for a fair \* and valuable consideration to any person whatever before his failure,) they alleging that the shares, or the net proceeds thereof, must be applied equally among all the creditors of Solomon; although Brooke charges, that he hath an equitable lien on the shares, or the proceeds thereof, in preference to any other of the creditors of Solomon, the shares having been a fund created on the credit of the notes, and not having been since assigned to a purchaser for a valuable consideration, without notice of such equitable lien. That Brooke hath applied to the assignees, Winchester, &c. who refuse to pay him the amount of the shares, or the value thereof, alleging that Brooke hath not any preference to the other creditors. Prayer, that the defendants be compelled to pay to the complainant the said shares, or the value thereof, in preference of the other creditors of Solomon, and true and perfect answers make, &c. Also to account with and pay to the complainant the said shares, or the value and net proceeds thereof, in satisfaction of the notes; and that the complainant may have such other remedy in the premises as the nature of his case doth or may require, &c.

The answer of Winchester, &c. so far as is material, stated, that when Solomon executed the deed of trust to them, he was insolvent, and owed large sums of money to several persons, far exceeding the value of all the property and effects which he was interested in, or had any title to. That these defendants had no notice, at the execution of the deed, that Solomon was indebted to the complainant, or any other person, for the 80 shares. That these defendants, all of whom are the creditors of Solomon, did, in July, 1799, sell the shares for \$1,613. That they are willing to pay to the complainant his proportions of all moneys which they received in virtue of the deed, and have always been willing to pay the same; but the complainant has refused to make any application therefor. They insist that the complainant has no lien, either equitable or legal, on the shares, or the money arising from the sales thereof, for the payment of the notes, as the shares were legally transferred to Solomon, and by him to these defendants. They say, that they have been informed by Solomon, and believe the fact to be, that Solomon purchased the shares on his account, and for his own benefit and use.

**3** \* The answer of Solomon is similar to the preceding answer. That at the time he executed the deed of trust, he was

indebted to a number of persons far exceeding the value of the property and effects to which he was entitled. That he did not inform the trustees, at the time he executed the deed, or at any time before, that he had not paid the complainant for the 80 shares. That after the execution of the deed he did not interfere in the administration of his effects, but the same, since that period, has been under the entire and exclusive control of the trustees. That on the 8th of May, 1795, and after the execution of the deed, he was arrested at the suit of some of his creditors, and confined in gaol in Baltimore; and that on the succeeding day the certificate of the transfer of the 80 shares was received by the trustees. He positively denies he ever told the complainant that he had a commission to purchase shares in the Bank of Columbia, or in any other bank, for a gentleman in Philadelphia, or any other place whatever, or that he acted as a broker in making the contract with the complainant; but he expressly says, that he purchased the shares on his own account, and for his own use and benefit. That the complainant, about 18 months after the purchase of the shares, applied to this defendant to sign an instrument of writing, stating that he had purchased the shares on commission, which he refused to do.

Testimony.—That the trustees of Solomon sold at auction 80 shares in the Bank of Columbia, to John Munnickuysen, on the 22d July, 1799, for \$2,480, which, after deducting duties and commission, amounted to \$2,413. That Charles Lowndes, in May or June, 1799, requested Munnickuysen to purchase for him 80 shares in the Bank of Columbia, who purchased the same for him for 31 dollars a share, amounting to \$2,480. That the shares had been previously sold by Lowndes in trust for the trustees of Solomon. That the dividends had been paid to the trustees. That after the sale to Munnickuysen, for the benefit of Lowndes, the shares were transferred to Lowndes. By the auditor's statement, the defendants are charged with the net amount of the sales of the 80 shares at auction.....\$2,413 00

Also with dividends received, and interest thereon to the 1st of July, 1799,..... 1,184 14

3,597 14

They were credited with 10 dollars paid on each of the shares, to complete the payments due to the bank on the shares; and also credited with the dividends and interest arising thereon as charged..... 899 28

Balance due to complainant,.....\$2,697 85

LANSON, C. (24th of March, 1803,) being of opinion that the complainant was entitled to payment of two notes, given to him by the defendant, Solomon, on account of eighty shares of Columbia Bank

stock, transferred by the complainant to Solomon, out of the net proceeds arising from the sale of the bank stock, so far as the same would extend, in preference to the other creditors of Solomon—Decreed, that the defendants, Winchester, &c. pay to the complainant the sum of \$2,697.85 cents, the same being the amount of the dividends and net proceeds of three-fourths parts of the sales of the eighty bank shares, according to the statement thereof made by the auditor of this Court, together with interest, till paid, from the service of this decree. That the complainant and defendants sustain the costs by them respectively expended in the prosecution and defence of this suit.

The Chancellor does not conceive that interest can be allowed, as proposed by the counsel, viz. from the 22d of July, 1799, to the 24th of March, 1803. If it were allowed it must either be charged to the trustees, or must come out of the estate of the insolvent, to the prejudice of other creditors. The latter would be surely unreasonable, when it does not appear that the trustees have received interest. From this decree the defendants, Winchester, &c. appealed to this Court.

The cause was argued before CHASE, Ch. J. TILGHMAN, POLK, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Harper*, for the appellants, cited and relied on *Ellis vs. Hunt*, 3 T. R. 464; *Lickbarrow vs. Mason*, 2 T. R. 63; *Barnes vs. Freeland*, 6 T. R. 80; *Green vs. Farmer*, 4 Burr. 2214; *Ex parte Ockenden*, 1 Atk. 235; *Pollerfen vs. Moore*, 3 Atk. 273; *Walker vs. Preswick*, 2 Ves. 622; 2 Roll. Ab. 92, pl. 1, 2, 6; *Brennan vs. Current*, *Sayer's Rep.* 224;

5 *Com. Dig. tit. Agreement*, (B. 3;) *Bond vs. \* Kent*, 2 Vern. 281; *Fawell vs. Heelis*, *Ambl.* 724; *Grimes vs. French*, 2 Atk. 141; and *Walpole vs. Orford*, 3 Ves. 416.

*Shaaff*, for the appellee, referred to *Ridgely vs. Carey*, 4 H. & McH. 167.

TILGHMAN, J. It is inconceivable how the Chancellor could take the case up on the ground of preference.

The Court of Appeals were about to affirm the decree of the Court of Chancery, inasmuch as it did not appear by the record that there were any other creditors but the complainant, whose claims had been proved and were allowed; nor had the trustees set forth the amount of the estate of Solomon, and the amount of the claims against the estate, so as to show the proportion which the complainant was entitled to, in case he was not entitled to a preference; but the counsel for the appellants

*Dismissed the appeal.*

## BAKER vs. THE STATE.

faro table set up in a house, not a dwelling-house, out-house, or place occupied by a tavern-keeper, retailer, &c. is not an offence under the Act of 1797, ch. 110, which directs that "no faro table," &c. "shall be set up, kept or maintained in any dwelling-house, out-house, or place occupied by any tavern-keeper, retailer," &c. (a)

Whether or not the Court can refuse to permit the counsel in a criminal case from arguing to the jury against the Court's construction of an Act of Assembly, after the Court had been called upon to give a construction to the Act? *Quere.* (b)

ERROR to Charles County Court in a criminal prosecution. The indictment stated, that Baker, (the plaintiff in error,) on the 21st of March, 1803, "unlawfully did set up a faro table, for the purpose of gaming, in a house in Charles-Town, in the county aforesaid, by the said John Baker for that purpose rented, against the form of the Act of Assembly in that case made and provided, and against the peace, dignity, and government of the State." Not guilty was pleaded. At the trial the attorney for the State, to support and maintain the prosecution, gave in evidence to the jury that Baker, traverser, was a resident of the City of Baltimore, and on the 1st of March, 1803, came from the City of Baltimore to Port-Tobacco, Charles County, where he rented a house of a certain J. E. Ford, for the term of fifteen days, and that the traverser did, on the day or days aforesaid, set up a faro bank, and played at faro in the house so rented by him of Ford. The traverser \* gave in evidence to the jury, that the place aforesaid was not a dwelling-house occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider; and that it was not an out-house occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider, place occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider. The attorney for the State then prayed the Court to direct and instruct the jury, that if they find from the evidence that Baker did set up a faro table, and play at faro in the

) In *Creager vs. State*, 5 H. & J. 232, where it was held that a bill of exceptions is not allowed in criminal cases, the Court said that in *Baker vs. State*, the propriety of allowing an exception in such cases was not considered by the Court, that it passed *sub silentio*, and therefore was not an error. Exceptions are now allowed in criminal cases under Rev. Code, 71, sec. 37. Cf. *Neff vs. State*, 57 Md. 885; *State vs. McNally*, 55 Md. 11. As to indictments for gaming, see *Wheeler vs. State*, 42 Md. 563.

In *Bell vs. State*, 57 Md. 108, it was held that, although the jury are judges of law as well as of fact in criminal cases, the Court has the right to instruct them as to the legal effect of evidence, and counsel will not be permitted to ask the jury to disregard the instruction of the Court. The constitutional right of the jury to judge of the law in criminal cases does not confer any powers upon counsel.

house stated in the indictment, they ought to find a verdict for the State. To which prayer the traverser, by his counsel objected, and contended before the Court that he was not guilty of any offence against the Act of Assembly, entitled, "An Act to prevent excessive gaming," unless the jury should find from the evidence that the place aforesaid was a dwelling-house occupied by a tavern-keeper, retailer of wine, spirituous liquors, beer or cider, or an out-house occupied by a tavern-keeper, retailer of wine, spirituous liquors, beer or cider, or place occupied by a tavern-keeper, retailer of wine, spirituous liquors, beer or cider. But the Court, (GANTT, Ch. J.) instructed and directed the jury, agreeably to the prayer of the attorney for the State, and refused to permit the counsel for the traverser to argue to the jury on the construction of the Act of Assembly as contended for by him in his objection to the prayer of the prosecutor. Whereupon the traverser, by his counsel, prayed leave to except to the opinion and direction of the Court to the jury, and also to the opinion of the Court, in refusing to permit him by his counsel to argue on the construction of the Act of Assembly, and that the Court would sign and seal this his bill of exceptions, &c. Verdict guilty, and judgment that the traverser be fined, and forfeit and pay to the State the sum of £50 current money for the offence aforesaid, &c. To reverse which judgment the traverser brought the present writ of error.

The cause was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, and NICHOLSON, JJ.

7 *T. Buchanan*, for the plaintiff in error.  
\* *Scott*, for the State.

CHASE, Ch. J. delivered the opinion of the Court, declaring that the Act of 1797, ch. 110, only applied to dwelling-houses, out-houses, and places occupied by tavern-keepers, &c. No opinion was given as to the question whether or not the Court below were right in refusing to permit the counsel for the traverser to argue to the jury upon the construction which they had given to the Act of Assembly, in their direction to the jury, on the prayer which was made by counsel. The Chief Judge said he was prepared to give his opinion that the counsel had no such right, after he had called upon the Court to give a construction to the Act, and the Court had done so.

*Judgment reversed.*

## BEATTY'S Adm'rs vs. CHAPLINE.

After a *feri facias* has been laid, and before a sale of the property seized thereunder, a writ of error, (bond with surety having been approved) does not operate to stay further proceedings under the *feri facias*. (a)

In this case a writ of *feri facias* issued on the 7th of April, 1806, on a judgment rendered in the late General Court, at October Term, 1805, returnable to this Court in June last. At which time the sheriff, to whom the writ was directed and delivered, returned the same to this Court, endorsed thereon, that he did, on the 16th of April, 1806, lay the same on the goods and lands of the defendant, but that he was prevented from making sale of the \* property by the production of a certificate that a writ of error had issued, (bond with security having been first given and approved,) on the 21st of April, 1806. A motion was made on the part of the plaintiffs for a writ of *venditioni exponas*, which motion was continued until this term; when it was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

Mason, for the motion, contended, that a writ of error was no supersedeas to a writ of *feri facias* which had been laid previous to the issuing of the writ of error; that an execution was an entire thing, and when once begun, must be completed. In his argument he cited the Act of 1713, ch. 4. *Charter vs. Peter*, Cro. Eliz. 597; *Door*, 542, S. C.; *Dyer*, 98, 99; *Sare vs. Shelton*, 2 Roll. Abr. 491, pl. 1. *Ibid*, pl. 6; *Tocock vs. Honyman*, Yelv. 6; *Agres vs. Lenthall*, 3 Keble, 308; *Meriton vs. Stevens*, Wille's Rep. 273; *Baker vs. Bulstrode*, Vent. 255; *The Queen vs. Nash*, 1 Salk. 147; 2 Ld. Raym. 990, S. C.; *Perkins vs. Woolaston*, 1 Salk. 321; 6 Mod. 130, S. C.; *Clerk vs. Withers*, 1 Salk. 323; 2 Ld. Raym. 1072, S. C.; *Spuraway vs. Rogers*, 1 Mod. 501; *Bac. Abr. tit. Error*, (H;) *Ibid. tit. Supersedeas*, (G,) pl. 5,) (E,) (D. 4;) *Cooper vs. Chitty*, 1 W. Blk. Rep. 67; 1 Burr. 21, S. C.; *Rorke vs. Dayrell*, 4 T. R. 411; *Sampson vs. Brown*, 2 East, 9; *Gilb. on Executions*, 22, 23; *Imp. Sheriff*, 154, 155; and the Stat. 5 Geo. II, ch. 7.

Martin, against the motion, relied on *The State vs. Page et al.* 1 H. J. 475; the Acts of 1713, ch. 4, and 1799, ch. 79, s. 10; *Mudd vs. Warren*, 3 Keble, 174; *The Complete Sheriff*, 270; Yelv. 44; *Lane vs. Richurst*, 2 T. R. 44; the Acts of 1715, ch. 33, s. 4; 1732, ch. 22; 1791, ch. 67, s. 4; 3 *Danvers*, 320, pl. 4; *Levett vs. Perry*, 5 T. R. 9; *Meagher vs. Vandyck*, 2 Bos. & Pull. 370; and *Inledon vs. Clarke*, Barnes, 212.

α) But in *Eake vs. Smith*, 24 Md. 339, it was held that under Code, Art. 33, the filing of an approved appeal bond stays an execution, whether the same has been in part executed or not. The defendant may defer giving bond until the last moment before execution is consummated.

CHASE, Ch. J. It is contended that a writ of error, with bond filed according to Act of Assembly, after seizure of goods on a *feri facias*, but before sale, is no supersedeas; and two positions are laid down in support of this doctrine:—

\* *First*. That an execution is an entire thing, and when once  
 9 begun cannot be stopped. *Second*. That the property is changed or altered by the seizure of goods on a *feri facias*.

On these two positions the argument rests. 1. As to the first position—In a *ca. sa.* I shall admit it, because there is but one single act to be done, and as soon as that is done, the execution is completed and executed—the arrest of the defendant, who is detained in custody to compel payment of the money; and if the supersedeas comes after the arrest, it is too late, the execution being executed.

As to a *feri facias* the position is not supportable in the extent contended for, but is subject to modification.

A *feri facias* begun by one sheriff must be finished by him or his executors; if out of office, he shall be compelled by a *distringas* to sell the goods, and pay over the money to the plaintiff, and so of his executors.

After seizure of goods on a *feri facias*, the death of the plaintiff will not prevent the sheriff's going on with the execution; but he may sell the goods, and bring the money into Court, which will be paid over to the executor. The death of the defendant after the seizure, will not prevent the sheriff from going on with the execution. These are the only instances in which an execution (a *feri facias*) is an entire thing, according to the decisions of the Courts.

There are four essential acts necessary to be done to perfect the execution of a *feri facias*, in order to divest the property of personal chattels out of the defendant, and transfer them to another. 1. Seizure of the goods by the sheriff. 2. The appraisement. 3. Public notice of the sale. 4. The sale of the goods by the sheriff after public notice.

In the case of land, another requisite must be complied with to vest the legal estate in the vendee—a deed from the sheriff to him.

The return of the *feri facias* is necessary for the purpose of ascertaining the sum made by the sale of the goods, to lay the foundation for a second *feri facias*, in case the sum made should be incompetent to the discharge of the debt and costs; or if there was a surplus in the hands of the sheriff, after payment of the debt and costs, to enable the defendant to proceed against the sheriff, in a summary way, to compel payment of the surplus to him.

\* As to the first—The seizure of the goods by the sheriff.  
 10 The sheriff by the seizure acquires a special property in the goods to preserve them, subject to the execution, and can maintain trespass or trover for them against wrong-doers; they are in *custodia legis*, to be disposed of by the sheriff according to law.



The general property is not in the sheriff, because he has a special qualified property in contra-distinction to the general; and because he cannot retain them at an appraised value and pay the money to the plaintiff.

The general property is not in the plaintiff, because the sheriff will not deliver them to him at an appraised value in satisfaction of debt. The question occurs, where is the general property? It is in the defendant, or in abeyance in contemplation or intendment of law, and will vest in future where the law directs.

It is said that by the seizure of the goods on a *fiery facias*, the defendant is discharged. I admit the position subject to one restriction, if not more. He is discharged *pro tanto*, that is, to the value of the goods seized. How is that value to be ascertained, and what is the true and legal criterion of it? Not the appraisement, but the value obtained on a public sale;—and the discharge of the defendant is only to that amount, which cannot be ascertained but by the sale and the return of the *fiery facias*. To elucidate it—suppose a *fiery facias* issues for \$500, and the sheriff returns, laid as per schedule, made to the amount of \$100, what is the discharge of the defendant? Only *pro tanto*, the \$100, and this return lays the foundation for a second *fiery facias* to recover the residue of the debt.

As soon as the sale is made, the general property, which was before in the defendant or in abeyance, is transferred to the vendee by operation of law, and he becomes the absolute owner of the goods.

On a writ of error the judgment should be reversed after sale made, the property will not be divested out of the vendee, and re-vested in the defendant below, because the property vested in the vendee by operation of law, according to the legal course of proceeding in administration of justice. But if the judgment should be reversed, after seizure and before sale, the general property, if in abeyance by the seizure, will revert to the original defendant by operation of law, and he is entitled to a writ of restitution to obtain the possession. So that it is plain the property is not taken by the seizure, but by the sale.

It is said that, if goods are taken on a *fiery facias* the defendant is discharged, and the plaintiff cannot issue another execution, or bring an action of debt on the judgment. I have already pointed out in what manner he is discharged, and shall admit the plaintiff cannot sue out another execution, or bring an action on the judgment, pending the *fiery facias*; and the reason is obvious, because it is presumed the sheriff has already taken goods enough to satisfy the debt, and it cannot be known but by the sale whether the goods taken are sufficient or not to discharge the debt; and therefore, pending the pendency of the *fiery facias*, he is precluded from proceeding by another execution, or by action of debt on the judgment. It is also said, if the sheriff takes goods on a *fiery facias*, and they are rescued or lost, the sheriff is responsible, and from thence it is

inferred the defendant is discharged. I admit the position, but not the inference generally, because I have already stated my ideas of the nature of the discharge. The sheriff is answerable, because in the first instance put, he can summon the *posse comitatus* to aid him against the rescuers, and can bring suit against them. In the second, if they are lost, it is supposed to be owing to his negligence, and therefore he is answerable, and the recovery against the sheriff would be the measure of the defendant's discharge.

But suppose the sheriff takes a negro on a *feri facias*, or goods, and the negro dies the next day, or the goods are consumed in the sheriff's house, with his own goods, before he has time to sell them, would the sheriff be liable without any fault or negligence imputable to him? If not, this would constitute another limitation on the position that the defendant is discharged by the seizure on a *feri facias*.

2. Having premised thus much, I will now refer to the decisions which I consider as supporting the doctrine, that there is no change of the property of the goods taken on a *feri facias* until the sale is made by the sheriff, and that the *feri facias*, until the sale is made, is not executed, and consequently that a writ of error is a supersedeas at any time before the sale.

**12** \* If sheriff levy goods on a *feri facias*, and return on hand for want of buyers, the property is in the defendant. 1 Bro. 41, (6 James L.) A writ of error is a supersedeas if the sheriff receives it before sale, because the property is not altered. Roll. Ab. 491, pl. 5, (17 James L.) This case was decided fourteen years after the Statute of the third of James requiring bail, and is the second case which was decided. The reason, because the property is not altered; and I add, because the execution was not executed before the sale. The sale is the most material part of the execution, because it ascertains the value of the goods, the amount for which the defendant is discharged, divests the property out of the defendant, and vests it in the vendee. 3 Keb. 169, pl. 4, (25 Car. II;) Yel. 44. By the seizure of the goods the owner's property is not altered, for the seizure is not any execution, but only the beginning of it. The sheriff after such seizure ought to return the writ executed *in tanto*, and cannot by law deliver them *in pais* to the plaintiff. Yel. 44. If the sheriff returns *nulla bona* on a *feri facias*, and there is a recovery against him for a false return, that vests no property of the goods in him, but they remain in the party, and are liable to any subsequent execution for his debt. 2 Vern. 238, 9. If the sheriff on a *feri facias* levies the goods and pays the plaintiff with his own proper money, yet he cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. Noy. 107. Where a writ of *feri facias* is delivered to the sheriff to-day, and another to-morrow, and the sheriff executes the last first, by making sale of the goods, such sale will stand good, and the vendee shall hold the

ds against him who first delivered the writ to the sheriff. *Smallb vs. Buckingham et al. Carthew*, 420, (9 Wm. III.); 2 *Bac. Ab.*; per Holt, Ch. J. The sale is the execution of the writ of *fiery facias*; the sale transfers the property. *Vide* the case of *Rybot vs. Pham*, (19 Geo. III.) 1 *Term Reports*, 731, (note.) Neither before Statute of Frauds, nor since, is the property of the goods altered, continues in the defendant till the execution executed. 2 *Eq.* 381, per Lord Hardwicke. So long as the execution is executable but not executed, the allowance of a writ of error is a supererogatory, but not afterwards. 1 *Salk.* 321, 322. In the case of *Incles vs. Clarke, Barnes' Notes*, 212, a question, whether after the writ is perfected the goods can be restored? *Vide Meriton vs. Evans*, (16 Geo. II.); *Sykes vs. Dawson*, (18 Geo. II.) Held, that if the defendant's person be taken by a *ca. sa.* and bail in error afterwards, the person shall be discharged; but in case of a *fiery facias*, proceedings so far as the sheriff hath gone must stand. 2 *Crompt.* 354. An *elegit* executed on goods only is not a *fiery facias*, for a *fiery facias* is executed by sale by the sheriff; but the *elegit* by appraisement of the goods by a jury and delivery to the party. 2 *Bac.* 349, (note b.) According to the Statute of Frauds and perjuries writ of *fiery facias*, first delivered to the sheriff, is entitled to the writ; but if the goods are seized and sold under the second *fiery facias*, the goods are protected in the hands of the vendee; but if re-sale they are seized under the first *fiery facias*, the sheriff may ought to sell them on the first *fiery facias*, and pay the money to the plaintiff in that case. 1 *Term Reports*, 729. This decision contradicts the two positions relied on to prove that the writ of error is no longer a supererogatory after seizure. 1st. That the execution is an entire thing cannot be stopped or suspended. 2d. That the property is transferred by the seizure. In this case the goods were first seized on the second *fiery facias*; they were afterwards seized and sold on the first *fiery facias*, and the sale adjudged good, and the money paid over accordingly. Any time before a sale the sheriff has a right to give the preference to that *fiery facias* which by law is entitled to the priority. The property of the goods was divested out of the defendant by seizure on the second *fiery facias*, the sheriff could not have laid the first *fiery facias* on them, because they were not the property of the defendant; but he did seize them, and sell them on the first *fiery facias* after the seizure on the second *fiery facias*. *Vide* the rule, and see Buller's opinion. In this case, *Cro. Eliz.* 597, and *Salk.* were cited and relied on by the counsel who contended for the rule.

In this case is considered on the Act of 1713, ch. 4, independent of the English authorities, I think it is plain the writ of error is a supererogatory at any time before sale; and that such exposition is conformable to the intention of the Legislature and in furtherance of the same. In expounding the Act of 1713 relating to appeals and

writs of error, we must consider the evils which existed before, and the remedy provided for them, and give such an exposition to  
**14** \* the Act as will remove the evils and advance the remedy.

A writ of error, before the Act of Assembly being a supersedeas, the plaintiff sometimes lost his debt by the defendant's wasting his goods, or becoming insolvent, before the judgment was affirmed. To remedy this evil, bond, with security in double the sum recovered was required, before a writ of error was a supersedeas. This was thought by the Legislature a sufficient security for the debt and damages in case the judgment should be affirmed.

In this manner the evil on the part of the plaintiff was fully removed.

The evil on the part of the defendant was, that his person might be detained in prison, or his property sold, before it could be ascertained whether the judgment below was erroneous or not. And further, in case the judgment was erroneous, and reversed, he might lose his property by the sale of the sheriff, and payment of the money to the plaintiff, if he should become insolvent before the judgment was reversed, or before the money could be recovered back.

If bond is given in the manner prescribed by the Act of Assembly, the writ of error will stay the issuing of the execution if it had not previously issued, or will delay or suspend the further progress by the sheriff in the execution of it, if it was not executed when the bond was filed.

The writ of error bond being in the penalty of double the sum recovered, with two securities approved by the Chancellor, was deemed by the Legislature ample security for the debt, interest, damages and costs, of the plaintiff, in case the judgment should be affirmed. This is all the plaintiff was entitled to by law; this is all he could in justice require, and for this he has ample security, independent of the defendant's property.

If the property is of a perishable nature, subject to natural decay, the fly or weavel, or casualties of any kind, the plaintiff cannot be injured by its remaining in the custody of the law to be operated on according to the decision of the Appellate Court; by which it is to be ascertained whether the judgment below is erroneous, and whether the defendant is indebted to the plaintiff or not.

But suppose the Court should decide the writ of error is no supersedeas after seizure of the goods, or lands, and the \* sheriff  
**15'** proceeds to make sale, and does sell, and the money is paid over by the sheriff to the plaintiff, and after all this is done the judgment is reversed, and the plaintiff becomes insolvent, or he pays the money over to one of his creditors, and becomes insolvent before a recovery over can be had, what is the situation of the defendant? He is deprived of his goods and his land, although he owed nothing, and he is without remedy. But suppose the plaintiff does not become insolvent, the defendant loses his land, and must bring suit for

money, which in most cases is not more than half the value of the property, because sold at a sheriff's sale for cash.

It was the intention of the Legislature to prevent the defendant's being injured by a sale of his property while the writ of error was pending, and he was allowed to interpose his bond (which was made an ample security,) to prevent the sale of his property.

No injury can be done the plaintiff by deciding that the writ of error is a supersedeas at any time before sale, because he has ample security for his debt and costs, and he will be fully compensated for detention of the debt by the damages awarded by the Court of appeals. But by a contrary decision, a defendant may be deprived of his goods or lands, or both, and be without remedy, if the judgment should be reversed. The former corresponds with a sound and rational exposition of the Act, is agreeable to the intention of the Legislature, and will conduce to the advancement of justice, and therefore ought to be adopted.

It should be determined that the writ of error is no supersedeas. If seizure and before sale, the plaintiff will lose the benefit of the writ of error bond, and cannot resort to it in case there should not be enough levied to satisfy the debt, damages and costs.

JCHAMAN, J. (a) The case is this—A judgment was rendered against the defendant, in favor of the plaintiffs, in the late General Term, upon which judgment a *fiery facias* issued, returnable to this Court, and the sheriff, to whom it was directed, laid the same on real and personal property of the defendant on the 16th of April, 1806, and on the 21st of April, 1806, an appeal bond was filed, and writ of error issued, a certificate of which being shewn to the sheriff, he returned on the *fiery facias* to this Court, \* “laid as per rule, and staid by writ of error;” and the application to the Court now is, to award a *venditioni exponas*. 16

It is contended that the Court are not competent to award a *venditioni exponas*, because, as it is said, the writ of error is a supersedeas; and the case in 2 Rol. Ab. 491, pl. 5, has been relied on in support of this position; but that case, by going too far, defeats itself; for it is there said, that the property shall be returned to the defendant, which has not been considered or adjudged to be law; the reason assigned in support of the *dictum* being untrue, if it does not defeat the position, it at least weakens the authority. That the defendant is not entitled to a restitution of the property, seems a position not controverted, and is, I believe, admitted by our Chief Justice, the Chief Judge; nor indeed can it now be a question, for the current of authorities, both before and since *Rolle*, are to the contrary, with this exception, that when the goods are taken after

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GILGHMAN, J. concurred with a majority of the Court, but he was not present when the Judges delivered their opinions.

the point of time from which the writ of error operates as a supersedeas, the seizure is irregular, and for irregularity in the execution, the goods shall be returned; but in no case, except where the execution is irregular, shall the defendant be entitled to a restitution of property. And in the case before us, the goods were taken before the writ of error issued, the seizure therefore was regular and lawful, and not within the exception.

But it has been said, that although the defendant is not entitled to a return of the property, yet the goods shall remain in the condition in which they were found by the writ of error; that is to say, not to be sold, but to continue in the sheriff's hands during the pendency of the writ of error and in support of this opinion the case of *Incedon vs. Clarke*, in *Barnes' Notes*, has been cited, in which it is said, that where goods are taken under a *fieri facias*, and bail in error afterwards perfected, the proceedings, so far as the sheriff has gone, shall stand; but I do not understand that case to mean, that the goods shall remain in the sheriff's hands until the ultimate determination of the suit in error; on the contrary, I take the true exposition and meaning of the case to be, that the execution being begun, by seizure of the goods, the property is placed without the control of the writ of error, and a supersedeas cannot reach it; and indeed the

**17** reason of the case is opposed \* to any other construction. Writs of error are too frequently resorted to for purposes of delay only; and if a writ of error issued after property taken in execution, was a supersedeas, the inconvenience resulting to creditors would be very great, for no defendant would ever sue out his writ of error, until the sheriff had proceeded on the execution; and though the plaintiff should delay his execution to the latest practicable period, the defendant would be as backward with his writ of error; a practice which would prove very vexatious to creditors, and the contrary position can be attended with no inconvenience or loss to defendants; for if they have merits, and in truth wish to take their cases to a superior tribunal, for good cause, it is at all times in their power to do so, before any proceedings are had under the judgments below. But it is said, that if a writ of error, issued after property taken under a *fieri facias*, is no supersedeas as to the sale, it would work great hardships to defendants in cases in which the judgments below should be reversed; but that cannot be deemed a hardship which a defendant draws upon himself by his own negligence; and if it is an inconvenience, it is one of his own seeking; it is an inconvenience to which, in a controverted case, he need never be subjected, and which, in cases of removal for delay only, he deserves to suffer, and none but himself should suffer by his laches, which might not be the case if the goods were to be arrested in the sheriff's hands to abide the suit in error; for, though the defendant files his bond with sureties, on suing the writ of error, yet it cannot be contended, that the plaintiff's security would not be lessened by a delay

the sale, until the suit in error was determined. The goods themselves are the best security a plaintiff can have, and if they were be arrested in the hands of the sheriff until the affirmance of the judgment, not only they might perish, but the appellant, and his co-defendants, might become insolvent, and the appellee to be thus defeated of his just claim, so that the security of the plaintiff would be lessened, and that by the intentional delay of the defendant. And in the case of personal property, it would be better for the defendant himself that it should be sold, than to lay in the hands of the sheriff, where there would be the greatest probability that it, if not all, would perish before an ultimate determination.

The hardship attending defendants was much and ably brought out upon in argument, as the question related to goods sold under a *fi. fa.*; but it is admitted, and so are the authorities, that if a writ of error comes after the defendant is committed under a *ca. sa.* it is no supersedeas, and the defendant must remain in gaol until the suit in error is determined; and if the suggestion of hardship, is an argument to shew that a writ of error is a supersedeas as to sale of goods taken before, the argument applies with more forcibly to the situation of the defendant himself, who is in gaol under the *ca. sa.* for certainly, it is harder to be confined in prison, than to have goods sold under execution; but this argument of hardship has never prevailed in the case of a seizure of the goods under a *ca. sa.* as appears by all the books, and surely then it will not prevail where it applies with less force. When a defendant will not sue out his writ of error, before his goods are sold under a *fi. fa.* it affords a strong presumption that his object is to delay only, to which as little encouragement should be given as is consistent with the strictest principles of law can be; and so much have the Courts leaned against such practices, that in the case, *Master vs. Grant*, 5 Term Rep. 714, the Court refused to stay proceedings, the plaintiff in error having declared that he brought the writ of error for delay.

The property in goods taken by a sheriff under a *fi. fa.* becomes vested by the seizure, by authority of law, for all the purposes intended by the writ; and therefore it is, that a writ of error which is afterwards, is not a supersedeas; for the writ of *fi. fa.* may, after the seizure, be said to be gratified, since the sheriff, without requiring any return thereof, may sell the goods, and satisfy the judgment. It is said in 1 *Brownlow*, 41, "that if the sheriff takes the goods under *fi. fa.* and returns that they are in his hands for the use of buyers, the property remains in the defendant;" yet such is the current of authorities to the contrary, that I cannot yield to that position, if by it is meant that the property is not altered; and the writer may have intended to attempt a distinction between the property being altered, and divested out of the defendant. There is also in 2 *Equity Cases* Ab. 381, referred to in the argument,

in which it is said, that neither before nor since the statute, (by which the property is only bound by the delivery of the writ to the sheriff,) is the property of the goods altered, but continues in the defendant until execution executed. But I do not consider that case as an authority against me, on the contrary, I view it as an authority in support of the position I have taken. The question in that case did not arise on the effect of the seizure by the sheriff, but of delivery of the writ to the sheriff. Before the statute the goods were held to be bound from the *teste* of the writ, but by the statute from the delivery of the writ to the sheriff; and Lord Hardwicke meant to say no more, than, that although the goods were bound, yet the property was not thereby altered until seizure by the sheriff; and probably by the expression "execution executed," he intended no more than a taking under a *fi. fa.* or he may, (under the idea of an execution being an entire thing,) have meant that by the taking, an execution becomes executed; and the same language is used in the case of *Meager vs. Vandych*, in 2 *Bosanquet & Puller*, 370, where the taking of goods by *fi. fa.* is called the execution of the writ.

The property, by seizure, is altered for all the purposes of the execution, and thus is placed out of the reach of a supersedeas on writ of error. If the sheriff after seizure dies, his executor may sell; after he ceases to be sheriff he may sell; if the plaintiff or defendant, or both, should die after seizure, he may sell, and he may sustain an action for the goods against a stranger, or even against the defendant himself, if he takes or destroys them. In short, the authorities are so numerous and unequivocal in support of this position, that all reasoning on the subject seems to be shut up. Lord Chief Justice Willes, in deciding the case, *Meriton vs. Strens*, page 281 of his Reports, says, (in speaking of the case in 2 *Rolle's Ab.* 491,) very laconically, (which shews that the principle was then well settled,) "the reason not being a true one, I give no credit to this case." And the reason assigned by *Rolle* is, that the property is not altered by the seizure. And *Gilbert*, in his *Treatise on Executions*, not by quotations from other authors, and without reference to any, but as a text, lays it down as established law, as an undeniable principle, that the property in the goods is altered by seizure, and the sheriff may sell notwithstanding supersedeas comes afterwards, and if he does not the Court will award a *venditioni exponas*.

The same position is also laid down in *Impey's \* Sheriff*, both books of very high authority; and it cannot be presumed that the question was not fully settled when they wrote. It is a general and a true position, that a defendant is discharged by the seizure of goods under *fi. fa.* so far as the goods taken will go; and so far the judgment, as between the plaintiff and defendant, is in effect satisfied, and the debt discharged, and being so satisfied, there is nothing for a supersedeas to operate upon, or in other words



ing to be superseded; and hence it is, that a writ of error can in no way affect goods already taken; for it would be idle to say, a writ of error, (which is issued to review the proceedings in Court below, and to prevent a judgment being satisfied before review,) shall operate as a supersedeas to that end, after the judgment, so far as concerns the defendant, is actually satisfied; for the office of a supersedeas is not to undo what is done, but to prevent further proceedings; therefore, if goods only to part of the content of the judgment be taken before the writ of error issues, it cannot undo what is done, but shall be a supersedeas as to the taking of any other goods. On these grounds, if there were no decisions on the subject, and the question was now to be decided, I should be of opinion that the writ of error in this case is not a supersedeas. But the authorities, independent of any reasoning, seem not to be combatted. An execution is said in the books to be an entire thing, and when once begun cannot be stopped or superseded. The different writers have not very clearly explained their meaning of the entirety of an execution, though they all, except *Rolle*, are in this, that when once begun it cannot be superseded. The writ of *fi. fa.* commands the sheriff that of the goods, &c. of the defendant, he cause to be made the debt, &c. The making of the debt is the thing to be done, and the seizing of the goods, the sale, &c. is but the manner, and, as between the plaintiff and defendant, the debt is in effect made by the seizure, so far as the goods will go; the execution may be said to be an entire thing in this, that after the seizure, the appraisement, notice and sale, are matters of course, incident to the office of sheriff; and when done, have relation to the original taking, and thus by fiction of law, arising out of the doctrine of relations, it becomes an entire thing—as is the case in several kinds of conveyances; for instance, by fine or common recovery; and also \* in the common case of a grant, which is as a matter of course, (all requisites having been duly complied with,) and relates back to the certificate, and makes it one entire conveyance. But the entirety of an execution has been denied, and in contravention of the principle, the case *Johnson vs. Johnson*, reported in 1 *Term Rep.* 729, has been cited and relied on, though I cannot conceive how the decision in that case in any way affects the question. The decision is, that if two executions come to the hands of a sheriff, though he seizes the goods by virtue of that which was last delivered, yet he is not ought to apply them to the discharge of that which was first delivered, because the goods were bound by the delivery of the first writ; but the Court also said, that if the sheriff in such case actually delivers the second execution, the sale shall stand good, and the person claiming under the first execution shall have his remedy against the sheriff; and this last position, under the Statute of Frauds, is in full benefit and quiet of innocent and *bona fide* purchasers. But

this case does not at all deny the entirety of the execution, but is grounded on the principle that the goods being bound by the delivery of the first writ, the seizure under the second was altogether irregular. And in *Carthew's Rep.* 420, the case of *Smalcomb vs. Buckingham*, the same principle in favor of a purchaser is decided. The authorities in support of the principle, that a writ of error after goods taken under a *fi. fa.* is no supersedeas, but that the sheriff shall go on to sell, are very numerous, and some of those which are most in point, and by which the principle seems to be so firmly established as not now to be shaken by any artificial reasoning, I will take a short view of, as this is a case depending upon authorities.

The first of them in order of time is the case of *Charter vs. Peeter*, in *Cro. Eliz.* 597, in which case the sheriff took the defendant's goods by a *fi. fa.* but before sale a writ of error and supersedeas came, whereupon the sheriff made return that he had seized the goods, but that they were in his hands *pro defectu emptorum*, and also that a supersedeas was awarded; and on a motion for a return of property, the Court denied a restitution, and awarded a *renditioni exponas*, because the execution was begun by the seizure; and a case in *Dyer*, 98, to the same effect. In *Moor*, 542, it is laid down, that if the sheriff has the goods \* of the defendant in his hands under a

**22** *fi. fa.* and a supersedeas comes, he shall not deliver them, but shall sell them, because the beginning of the execution was before the supersedeas came, and the execution being entire shall not be divided. In the case *Tacock vs. Honyman*, in *Yelv.* 6, it is held, that if a writ of error and supersedeas come to the sheriff after goods taken, he shall proceed to sell what he has taken, but shall levy no more. And in the case of *Baker vs. Bulstrode*, 1 *Ventris*, 255, it is decided, that if the sheriff takes goods by *fi. fa.* before writ of error, the execution is not to be undone by writ of error afterwards, though at the time the writ of error comes the goods may be on hand for want of buyers. But it is argued, that these cases were all decided before the statute requiring bail in error, and that after the statute the principle before established by them ceased to be law; and in support of this position the case in 2 *Rol. Ab.* 491, which was after the statute, is relied on; and this is the only case I have seen either before or since the statute to the contrary. And it is worthy of remark, that security or bail in error being required by the statute, is not given as the reason of the doctrine laid down in *Rolle*, nor does it appear that the statute in that case was considered as working any new principle, but the reason assigned is, because the property is not altered by the seizure. This, Lord Chief Justice Willes says, is not a true reason, and in that he is supported by the later and very respectable authorities. In the case, *Rocke vs. Dayrell*, reported in 4 *Term Reports*, 411, Lord Kenyon, speaking of the writ of *fi. fa.* thus expressed himself—"As the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains

property in the debtor, on which the prerogative of the Crown attach;" a much stronger case, if it is law, than that of actual seizure.

In the case, *Clarke vs. Withers*, reported in *Salk.* 322, 3, and 2 *d Raymond*, 1072, these points were solemnly adjudged by the whole Court, but particularly by Holt, Chief Justice, and Gould, Justice—That a seizure of goods in execution is a discharge of the judgment; that the substantial part of the execution is the seizure, and that the rest is all form; that an execution is an entire thing, and not to be superseded after it is begun, and that the sheriff after seizure, (as a matter incident and of course,) is bound to \* sell;

and after seizure the judgment, (as to the defendant,) is discharged and satisfied; that by the seizure the sheriff gains a special property, and the property in the goods is divested out of the defendant; that the plaintiff has no farther remedy against the defendant, but must go against the sheriff; for the defendant having lost his property, may (in an action brought upon the judgment,) plead levied in *fa.* in bar, and it will be good. The same principle, as to the effect of the property by seizure, is recognized and asserted in our other books of high authority, and particularly *Gilbert on Executions*, 23, and *Impey's Sheriff*. Let it be observed, that the only case assigned in *Rolle*, why a writ of error is a supersedeas after seizure, is "that the property is not altered by the seizure," which is an implied admission, that if the property was altered, the writ of error would not be a supersedeas. And *Gilbert*, and the other writers say that a writ of error after seizure is no supersedeas, because by seizure the property is altered; hence it appears, that the question whether the writ of error is a supersedeas or not, depends on the question whether the property is altered or not by seizure. And as the case in *Rolle* appears in so questionable a shape, and is arrayed against a doubtful a reason, that it must sink in the current of authority by which it is overwhelmed. But independent of this reason—there are many adjudged cases, (since the statute requiring bail on error, and since *Rolle*,) which fix the principle, that a writ of error after seizure is not a supersedeas; and this proves that in England the statute was not considered as affecting the case.

In the case, *Agers and Lenthal*, in 3 *Keb.* 308, 9, it is said, "that on error and seizure, if no supersedeas comes before sale, it is good; and if error be mesne between seizure and sale, it doth not avoid it." A plain and obvious understanding of which is, that notwithstanding a writ of error and supersedeas comes after seizure, yet the sheriff having taken the goods before, if he proceeds to sell, the sale shall be good; and as the writ cannot be mesne between seizure and sale, unless there be a writ after the writ of error, the latter branch of the opinion must stand, that the error does not avoid the sale; by which it is evident, that the writ of error coming after the seizure is no supersedeas, for if it was, the sale would be void. Lord Mansfield, in delivering

the opinion of the Court in the case, *Cooper vs. Chitty*, reported  
 24 \* in 1 *Wm. Blackstone*, 65, 67, and 1 *Burrou*, 34, lays it down  
 as a fixed principle, that a writ of error cannot supersede an  
 execution, or a *fi. fa.* actually begun; and, as he says, for the plainest  
 reasons, because the execution is entire, and if once lawfully begun  
 must be completed; and because, as between the plaintiff and defend-  
 ant, the debt is discharged by a seizure under *fi. fa.* In the case  
*The Queen vs. Nash*, reported in 2 *Lord Raym.* 989, the question arose  
 on the effect of a *certiorari* to remove a conviction; which was  
 brought after the constable had distrained the goods of Nash under  
 a warrant from the justice to levy the penalty for deer stealing; and  
 Holt, Chief Justice, in deciding the case, likened it to the case of  
 goods taken under a *fi. fa.* before writ of error brought, and there  
 laid it down, (not as a case of first impression and then to be decided,  
 but as the known and acknowledged law of the land,) that when  
 goods are taken under a *fi. fa.* and then a writ of error comes, it is  
 no supersedeas, but the sheriff shall proceed to sell, and if he does  
 not, a *venditioni exponas* may be awarded. And so fully is the prin-  
 ciple established in England, that in the case, *Merriton vs. Stevens*,  
 in *Willes' Rep.* 271, Serjeant Wynn, who argued in support of the  
 rule to set aside the *fi. fa.* admitted, that if the sheriff had taken  
 the goods before sealing of the writ of error, he might have pro-  
 ceeded to sell them afterwards. Thus, then, it appears by all the  
 authorities, except *Rolle*, (both before and since the statute requiring  
 bail in error,) that a writ of error which issues after goods are  
 seized under a *fi. fa.* is not a supersedeas. And indeed the case in  
*Rolle* may be reconciled with the other decisions; for in the case,  
*Sampson vs. Brown*, reported in 2 *East*, 439, 444, it is said, that the  
 supersedeas issued after the writ of error upon which it was grounded,  
 so that, although the supersedeas came after the goods were taken,  
 yet the writ of error might, (for any thing appearing in the case,)  
 have been issued and allowed before, and the supersedeas having  
 relation back, the taking of the goods was irregular. The case is  
 very short, and by no means full. As to the entirety of an execution,  
 if it should be admitted to be a doctrine established on artificial  
 reasoning, yet it is an established principle, and, (like many others  
 supported only by the same kind of reasoning,) it cannot now be  
 shaken, without overthrowing every authority upon the subject, for  
 25 \* more than a century past. We have seen that by the com-  
 mon law, a writ of error, which (if taken out in time,) was a  
 supersedeas without security, was not a supersedeas if sued out  
 after goods taken under a *fi. fa.* We find also, that in England the  
 statute which requires bail in error, has never been considered as  
 altering the principle, or at all affecting the case, nor indeed could  
 any such construction be given to the statute, which is in these  
 words: "That no execution shall be stayed or delayed, upon or by  
 any writ of error," &c. "unless," &c. Thus the statute does not

e a writ of error any more efficacy than it had at common law,  
 on the contrary takes from it all the efficacy it had at common  
 as a supersedeas, unless it is accompanied by bail; and in fact  
 kes it, with bail, what it was before without bail, and no more;  
 this being the uniform construction of the statute, not denied  
 n by *Rolle* himself; for (as I have before observed, the case put  
 him is not attempted to be supported by authority of the statute,  
 by another reason which is not law,) the same construction must  
 given to the Act of Assembly, 1713, ch. 4, regulating writs of  
 r, &c. which is in the same words contained in the statute, and  
 ably so far copied from the statute; and indeed the same con-  
 cation has always been given to the Act of Assembly, and acqui-  
 d in until lately. The case then is shut up. In England no  
 tion exists, nor would an argument be heard on the subject; and  
 is State the words of the Act of Assembly, and the Act of Par-  
 ent, being the same, they must receive the same construction,  
 our Courts of law must be bound by the authorities, whatever  
 lcial reasonings might be offered to the contrary. The old super-  
 as law, and the practice which is said to have been pursued  
 r that Act, have been urged by counsel in argument, to shew the  
 construction of the Act of 1713, ch. 4, but neither that Act, nor  
 practice under it, (whatever that practice may have been,) has  
 bearing on the case; for when it is said that an execution is an  
 e thing, and cannot be superseded, it is intended by a superse-  
 on writ of error, and not a supersedeas created by statute, or  
*adita querrela*, &c.

e cases which turn upon the point of time, from which a writ of  
 was held to operate as a supersedeas, relate to this case in no  
 manner than as they show, that at common law a writ of error,  
 h issued after goods were \* seized under a *fi. fa.* was not  
 persedeas; and in this case the writ of error, having **26**  
 d after the goods were taken by the sheriff, it must receive the  
 construction which at common law it would have had, the Act  
 ssembly giving to writs of error as such, no greater efficacy than  
 had before; nor does the circumstance, that the *fi. fa.* in this  
 was laid on lands as well as goods, make any difference; for by  
 ct of Parliament, under which lands are held to be liable to  
 tion for debt in this State, real and personal property are  
 d precisely on the same footing.

on the whole, I consider this not as a new case now to be deter-  
 l, but one which has been settled ever since the reign of Queen  
 beth and not shaken by any adjudged cases since, except that  
*e State, use of Warder vs. Page et al.* which was determined  
 t in the Eastern Shore General Court, by my brother the Chief  
 e, whose opinions I very much respect, but to which I cannot  
 in this case, being tied up by what must now be considered as

the established law; and am therefore of opinion that a *renditioni exponas* ought to be awarded.

NICHOLSON, J. said, he had uniformly been of opinion, that it was improper for the Court in the last resort, to assign their reasons for the final judgment. In the inferior Court it was proper that they should give the reasons of their decision, because it afforded counsel an opportunity, when they came before the Court of Appeals, to shew the fallacy of the reasoning of the Court below, if it was fallacious. He had therefore, on this account, always given the reasons of the Court in which he presided. But here there was no necessity of that kind, because the decision of the Court of Appeals became the law of the land, whether that or their reasoning was or was not correct; and where the reasoning was bad, it was too often blended with the decision of the Court, and considered likewise as the law. The impropriety of assigning reasons in the Court of the last resort, he thought was strongly exemplified in this case. Two positions had been taken in the opinions given by two of the Judges, which in his opinion did not belong to the case. These were, whether the seizure upon a *fi. facias* did or did not divest the property out of the defendant, and whether the defendant was thereby discharged. Upon  
 27 \* these two points, he might agree with the presiding Judge, (CHASE,) although he differed with him in the result; and upon the same points he might differ with the other Judge, (BUCHANAN,) although he agreed with him in the result. He wished it, therefore, to be distinctly understood, that he gave no opinion upon either of these points, except that they had no bearing whatever on the question submitted to the Court.

He had been induced to decide, that a writ of error after seizure upon a *fi. facias* was no supersedeas, by a long train of decisions for more than two hundred and fifty years, (from the 1st year of Queen Mary.) A train of decisions prevailing for such a length of time, with the solitary exception of the case in *Rolle*, he considered equal to a statutory provision. The whole reasoning on the point really before the Court, was given in three lines by Lord Mansfield, in the case in 1 *Wm. Blackstone's Reports*, 67, viz. An execution being entire in its nature, and once begun, cannot be superseded by a writ of error, but must be completed, because the property is of a perishable nature, and is not to remain in the sheriff's hands to await the final determination of the suit.

GANTT, J. This is a motion for a *renditioni exponas*, and the case is shortly this: A *fi. fa.* was regularly issued upon a judgment obtained in the late General Court; this *fi. fa.* was regularly executed by a seizure of real and personal property. After seizure, the defendant filed a writ of error bond, and a writ of error accordingly issued, mesne the seizure and sale of the property taken. The sher-

returns that the sale of the property is stayed by writ of error, the motion for a *venditioni exponas* is founded upon this return. I was absent on the first day of the argument of this motion; but I have been furnished with a list of the authorities cited by the counsel.

I have reflected upon the case, both before and since the argument, and have referred to the authorities cited—and as I concur with the majority of the Court, I will, in as brief a manner as the case admits of, give my opinion, and the principal reasons which govern my decision.

I shall not pursue the various cases which have been cited in order, but particularly comment upon them. I consider \* it a waste of time, and useless trouble; almost the whole of them are founded upon one of these questions—whether a writ of error is a supersedeas from the *teste* or allowance of the writ or notice of its return; whether the execution has been regularly issued, or not, or according to the rules of practice established by the Courts of Great Britain for putting in bail on writs of error under the Statute.

Decisions, founded upon either of these principles, do not apply to the present case. The sole question is, whether this writ of error operates as a supersedeas to stay a sale of the property taken under a *fi. fa.* regularly issued and executed by seizure, before the writ of error is issued? In other words, whether the plaintiffs are entitled in law to a writ of *venditioni exponas* to compel the sheriff to sell that property?

The statute of James, and the Act of Assembly *quo ad* the subject of inquiry, are in my opinion exactly similar. I will dispose of the first, and then advert to those principles of the common law which govern this question. The statute of James was meant to correct the abuse of writs of error issued for delay, and to remedy a defect of the common law, which entitled a party to this writ, without giving the plaintiff security. Its effect was to destroy the implied supersedeas of a writ of error, unless security was given. Cases occur of issuing writs of error without giving security, and the difference between such writs at this time and before the Statute or Act of Assembly is, that it does not, at this time, supersede an execution, formerly it did supersede it.

The Act of Assembly prescribes a different mode for taking the writ than the one prescribed by the statute, but makes no further change of the common law in this respect.

Neither the statute, nor the Act of Assembly, deprives the plaintiff of any right, or destroys any property, interest or security, which either he or the sheriff had acquired. It extends not the legal operation of that writ, nor does its effect reach farther since the statute than it did before, when no security was given. It supersedes nothing, which it did not supersede before; but takes away from the defendant that power which the common law gave him, of stay-

**29** ing further proceeding on a judgment without \* any security at all—and this is the whole extent of the statute and Act of Assembly, as far as relates to the present subject.

No case has been cited, and none can be quoted, shewing, that by the statute or Act of Assembly, a more extensive effect or operation has been given to the supersedeas itself, than what it had at common law—none of the cases cited hinge on this principle.

At common law a *fi. fa.* charged only goods and chattels. In this State lands also, in which the defendant has any legal estate for his own use, may be taken under this process; and being equally liable to seizure, that species of property becomes, of course, equally liable to the same rules and principles which govern the other; I mean as to the seizure, and as to the power of selling, and also as to the alteration of property, but subject to a difference as to the time and manner of selling it. A sheriff may maintain actions for injuries done to the one as well as for the other species of property, according to the nature of the injury, and the qualified interest which he has.

At common law a *fi. fa.* charged the defendant's goods from the *teste* of the writ—a writ of error, therefore, operating as a supersedeas, would destroy this charge, if there had been no seizure, not expressly so, but by legal implication and consequence. But if the sheriff had seized goods under a *fi. fa.* he thereby acquired a property in them—To what extent or purpose? For the purpose of selling them, and of having the money in the Court to pay to the plaintiff. (*Gill. 15, &c.*) This property of course was not absolute, but qualified. It was co-extensive with this object and purpose; and only extended thus far, and no farther. Some authorities say, that by the seizure the defendant's property was divested—'tis true, it was so, but not absolutely. The expression must be construed with reference to the subject and nature of the case; that is, as far as the *teste* of the writ of seizure of the goods had vested a right or property in the sheriff or the plaintiff—so far, and no farther, was the defendant's property in them destroyed. What was the purpose of the law in vesting the property in the sheriff, or in charging the goods from the *teste*, and afterwards by statute, from the delivery of the *fi. fa.* to the sheriff? In the first place, to prevent the defendant from

**30** fraudulently selling or wasting them; \* and secondly, for the purpose of the sheriff selling them, and having the money in Court. Therefore, *eo instanti* that the purpose of the law was gratified, the residue of the goods were exonerated and belonged to the defendant, whether they had been seized or not. The property which the sheriff had acquired thereby, ceased; the liability to pay the plaintiff was exonerated, and the defendant's ownership once more became complete. While the sheriff's property continued he might maintain trover or trespass; and till a sale, the defendant might lawfully, in my judgment, contract for the sale of, or will the



is, subject to the charge which the law had imposed on them. If the sheriff had a qualified interest in the goods; the defendant had a qualified interest also; and these qualified interests together, composed a full and absolute ownership; each party, therefore, had a property in the goods. If the sheriff died, his executors had his property in them, subject to the legal purpose before mentioned. If the defendant died, his executors had his interest. The power which the sheriff had of selling, when exercised, ultimately terminated the qualified interest of each, and vested the absolute ownership in the purchaser. After the legal purpose was answered, the residue of the goods belonged to the defendant, or his assigns, unless a lien or charge on the goods, or the property divested out of the defendant had ceased, or was destroyed as to such a residue. Let us now consider the nature of a writ of error, viz. its objects and its effects.

First, as to the object. It is to remove the record and proceedings of an inferior tribunal to a superior one, to review that record, to reverse the judgment of the inferior Court if it is erroneous; the record must of course be the only subject of inquiry, for the question upon which the writ issues is, that in the record and proceedings there is error.

It removes the record and proceedings. If no *fi. fa.* or *ca. sa.* has been issued, then by legal implication this writ of error operates further, it transfers the power of the inferior Court to issue a *fi. fa.* for the record considered, in law, as removed *eo instanti* that the writ operates; before there is no foundation for the inferior Court to issue a *fi. fa.* It can only be grounded on a judgment in the Court which issues and which the judgment is removed with \* the proceeding. Hence the doctrine of contempt in the inferior Court in issuing the writ, or the sheriff in serving it after such writ of error; and hence the doctrine of executions irregularly issued. **31**

If the *fi. fa.* has issued, and is not served, the sheriff has no authority to levy it for the same reason; because by legal implication the power and authority of the inferior Court is superseded; and the sheriff derives his authority from the Court, and although the writ of *fi. fa.* issued while the Court had the power to issue it, yet, before the sheriff had levied the *fi. fa.* the power of the Court had terminated by legal inference and intendment, the sheriff, if he does the *fi. fa.* acts without authority, the writ of error surceasing all proceedings. Hence the doctrine of contempt in the sheriff if he does not serve the execution; and hence also the legal implication makes the writ of error operate as a writ of restitution of the goods thus taken in execution; because the sheriff had no authority at the time to levy it, and his seizure for that reason was irregular.

If the *fi. fa.* or *ca. sa.* has been served—if the goods or body of the defendant has been taken in execution, then the common law writ of error does not supersede the execution thus executed; for it

is a principle of law, that an execution is an entire thing, and once begun must be completed. If a *fi. fa.* is levied, it is as much the duty of the sheriff to sell the goods, and raise the money, as it is his duty, if he has arrested the defendant on a *ca. sa.* to imprison him till he pays the money. The seizure of goods, and the arrest of the body, are the principals, the selling of the goods, or imprisoning the body, are the incidents. Now, if a writ of error will supersede the sale after a seizure of the goods under a *fi. fa.* why not the imprisonment, after the arrest of the body, if it issued mesne the occurrence of the principal and of the incident?

After seizure of the goods or arrest, the whole object of the judgment and execution is answered as it respects the plaintiff and defendant. The defendant is discharged from the judgment to the extent of the goods taken, and the plaintiff looks to the sheriff only for the amount; or if the body is arrested it is a like satisfaction *quo ad hoc*; and if then the writ of error supersedes all further proceedings, it is only in the suit between the plaintiff and \*

**32** defendant, and by the seizure of the goods to the amount of the judgment, or *quo ad* the amount of the goods seized, or by the arrest of the body, all proceedings between the plaintiff and defendant are at an end, and there are no further proceedings to supersede.

This writ operates also as a writ of restitution, but only where an execution has irregularly issued, or been irregularly served. It does not operate as such where there is no irregularity, for then the very principle upon which it operates, as a writ of restitution, is wanting. The irregularity here meant is evidently determined and ascertained. by the time when the writ of error operated, either upon the power of the Court itself to issue the *fi. fa.* or upon the power of the sheriff to execute the writ; his sale in such case is void.

The writ of error annuls no act or proceedings regularly and legally done. It leaves such acts in *statu quo*. A writ of restitution, if the judgment is reversed, issues of course. Now, if the writ of error itself is in all such cases to be considered as a writ of restitution, it is in effect issuing the writ of restitution before a judgment of reversal, which legally cannot issue till afterwards; that is, to give the remedy first for the injury alleged to have been done, and afterwards to determine whether the injury has been done or not.

The sheriff can maintain trespass or trover for injuries done the property in his possession, as sheriff, even if done by the defendant. If the writ of error is a restitution, as contended for, it avoids that possession or property, and consequently his right to sue for such injury. Suppose the defendant has committed such injury, and the sheriff had sued between the 16th and 21st of the month when this property was taken, it non-suits the plaintiff, for his property was destroyed and overreached by the writ of error, and although his duty required he should protect the property, and sue for the injury done to it, yet the law, which requires and enjoins the duty, defeats

obligation it has created itself, and non-suits the very action it virtually, by imposing the duty, directed him to bring. her cases might easily be suggested, where similar violations of established principles would arise from the construction of the operation of a writ of error, now contended for.

But although I am for a *venditioni exponas* issuing in this 33

I am not to be understood as saying that the Court did not lay their hands upon some cases of a like application, where it evidently appeared that manifest injustice might be done. money may be ordered to be brought into Court, and await the effect of the writ of error. This power should, however, be exercised, upon the suggestions of possible cases, but upon cases where there exists well grounded apprehensions of such irreparable injury, as this power of preventing it was resorted to. The circumstances, properly disclosed, in such instances, should be previously manifest to the Court. This power was exercised by the Court in a case reported in *Willes*.

I have avoided, as I stated at first, any comments upon particular cases. Those which hinge either upon the irregularity of issuing execution, upon the time when a writ of error began to operate, or upon the rules of Court, founded upon the statute of James, I consider as not bearing upon this case.

I have, on more than one occasion, examined into the law upon this subject. The result of my inquiry has long since confirmed me in the opinion I have at present; and although I have considered the cases cited by the defendant's counsel with attention, I find no reason to alter that opinion, but am more confirmed in it; but I regret that accident prevented my hearing the arguments in this

writ of *audita querela*, or a bill of injunction, in ordinary cases, to remedy any inequity in the judgment itself, or in issuing or executing the execution. But the writ of error cannot be construed to be a more extensive operation and effect, merely to reach the sentences which possibly may arise from its ordinary extent of operation. The law has long since defined its limits, and the Court cannot extend them. Other remedies are provided, and open to the defendant's benefit, if the circumstances of his case require them. I cannot create a new one to give a more summary relief, for the circumstance of his case would justify a claim upon the ground of particular hardship. *Venditioni exponas ordered.*

over, on motion to dissolve an injunction, it appears from the answer that the complainant was entitled to an injunction at the time of obtaining it, the same shall continue until final hearing, or further order,

unless the defendant admits everything alleged in the bill, on account of which the injunction was obtained. When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved, with a proviso that not more be levied than remains due after allowing everything claimed by the complainant. But when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is invariably continued until final hearing, or further order. (a)

- A. purchased land from B. and gave to B. his bond for the purchase money in which C. joined as surety. C. became surety under the impression, which he derived from B. that the purchase money would be realized from the sale of the wood growing on the land. The first instalment of the purchase money not being paid, B. obtained judgment on the bond against A. and C. and also obtained an injunction restraining A. from cutting any more wood on the land. On a bill by C. a perpetual injunction was granted restraining B. from enforcing his judgment against C.

ROCHE vs. JOHNSON, note:

An appeal or writ of error standing under rule argument does not abate by the death of either party. (b)

APPEAL from a decree of the Court of Chancery, perpetuating an injunction. The bill of complaint of Colegate, the present appellee, filed the 10th of November, 1800, stated that one Kingsmore, in 1797, purchased of Lynch, the appellant, a tract of land for a large sum of money, to be paid by instalments; that the first instalment amounted to £1,200, and was intended, in a great measure, to be paid out of the first crop on the land, and by the sale of wood; that Lynch declared that the wood on the land would nearly pay for the land, and it was understood and agreed, that the wood should be cut and carried to market for the purpose of paying the instalments, (in aid of the crop,) as the same should become due; that in con-

(a) In *Dorsey vs. Smith*, 7 H. & J. 846, KILTY, C. said, that the rule recognized in *Lynch vs. Colegate*, is considered a proper one, and has been since acted on: but it might be oppressive where the sum was small, and the party to be affected by it not in fault. In *Chase vs. Manhardt*, 1 Bland, 336, the same Chancellor recognized the rule laid down in the case in the text, viz: that when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is universally continued. But in *Webster vs. Hardisty*, 28 Md. 596, the Court said: "Where a motion to dissolve is heard upon bill and answer, the responsive allegations of the latter must be taken to be true, and if the equity of the bill is sworn away by the answer, the injunction must be dissolved. It is insisted, however, that this case comes without the rule stated in *Alex. Ch. Prac.* 87, and in *Lynch vs. Colegate*. We do not find that this rule has been sanctioned by any decision of the Appellate Court, but we need not decide upon its correctness, because it does not appear from the answer in this case that the complainants were entitled to the injunction when it was obtained."

(b) As to abatement of cases in the Court of Appeals by the death of a party to the appeal, see Rev. Code, Art. 71, secs. 31-34; *Carroll vs. Bourie*, 7 Gill, 37.

ation of the express agreement that Kingsmore should have to cut and sell the wood in order to meet the instalments, the complainant became bound in a bond with him to Lynch, conditioned the payment of the first instalment of £1,200, with interest; the complainant would not have become security for the instalment, but under the express proviso and engagement that Kingsmore was to have leave to pay it off by wood; and that the inducement of his buying the land was the representation and statement by Lynch, that the wood on the premises, so convenient to cut, would nearly pay for the land. That Kingsmore paid £300 in part of the instalment; and other sums of money, and articles of value were paid, which Lynch has, or means to apply to other instalments, although they were not due at the time. That Kingsmore cut down 300 cords of wood to enable him to pay up the value of his first instalment, and to exonerate the complainant, surety; and that Lynch fraudulently meditated an act of oppression which he carried into effect, by bringing suits, immediately the first instalment became due, on the bond against Kingsmore and the complainant, and filing a bill in Chancery, and obtaining an injunction, which prevented Kingsmore from getting the wood to market, and to cut other wood, &c. That judgment has been obtained against the complainant by Lynch, who has not paid the £300, nor with such other sums of money, wood or articles, which he may have received. The bill calls upon Lynch to pay, &c. and to declare \* what sums of money, &c. he has received. Prayer for relief, and for a *subpoena*, and an injunction against executions issuing on the judgment, &c. *Subpoena* issued accordingly. 35

Answer of Lynch, which was filed on the 25th of November, denies that he ever declared or agreed that the wood on the premises should be cut and carried to market for the purpose of paying instalments, (in aid of the crop,) as the same should become due otherwise; nor was any agreement ever made by him with Kingsmore by which the same was to be paid by wood, or that wood should be cut and sold from the land for that purpose; and therefore no inducement from such agreement could have been the motive for the complainant for becoming surety for Kingsmore, no such agreement having ever been made. He admits that he received £94, at sundry times, as appears by one of the accounts exhibited, which are all the payments whatsoever made by Kingsmore on account of the bond in which the complainant is surety. He never denied the payments, nor claimed to appropriate the same to any other instalment, but hath been, and now is, ready and will credit the same on the bond for £1,200, in which the complainant is surety. That the credits in the other account exhibited were not received, and applied to the discharge of another debt due by the defendant for the articles mentioned in the debit side of that

account, sold and delivered, &c. and had no relation to the land purchased. That Kingsmore and the complainant, having failed to comply with the condition of their bond, the defendant caused suits to be instituted for the recovery of the balance due thereon, and hath obtained judgments at law. That Kingsmore having proceeded, against the consent of the defendant, to the cutting and selling timber, and other trees, growing on the land, and done other acts greatly endamaging the estate, and injuring the defendant, he applied for and obtained an injunction, &c. He denies all fraud, &c.

HANSON, C. (November 25th, 1800.) The defendant having put in his answer, and entered on the docket notice of motion to dissolve the injunction in this cause issued, it is at his instance ordered, that the motion stand for hearing at next term; provided a copy of this

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order \* be served on the complainant before the end of the present month.

A service of the above order was proved to have been made, on the 27th of November, 1800.

HANSON, C. (January 6th, 1801.) The motion to dissolve, &c. being submitted, &c. The Chancellor must, on this occasion, repeat a rule, which he has always adhered to, and which he conceived was well known—"Whenever, on motion to dissolve, it appears from the answer that the complainant was entitled to an injunction at the time of obtaining it, the same shall continue until final hearing, or further order, unless the defendant admits every thing alleged in the bill, on account of which the injunction was obtained." When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved with a proviso, that not more be levied than remains due after allowing every thing claimed by the complainant; but when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is invariably continued until final hearing, or further order. Great and obvious inconveniences would follow from a different practice. In the present case, it appears from the answer, that the complainant, at the time of obtaining his injunction, was liable to an execution, (if liable to an execution at all,) for more than was due, but in admitting this, the defendant denies the other grounds of equity; he denies that the complainant is entitled to all the deductions which he claims, so that a dispute remains between the parties. This case, like many other cases, shows, that taking an indefinite judgment does little for the plaintiff at law, but affords a fair pretext to the defendant at law for further delay, and is almost sure to produce a fresh suit between the parties. If it is thereupon adjudged and ordered, that the injunction, in this cause heretofore issued, shall continue until final hearing of the cause, or further order.

the complainant entered a general replication to the answer of the defendant, and a commission issued, and testimony taken thereon, and the cause submitted, &c.

ANSON, C. (October Term, 1801.) It appears to the Chancellor that the defendant, from his conduct, ought to be considered as having released the complainant \* from his engagement. It is plain from the evidence, that the defendant had at least **37** released the complainant, before he became security for Kings-land, with an idea, that the money would, or might be paid from the sale of timber, and other wood, on the land, and it is extremely probable, if not certain, that the complainant was thereby induced to become a surety. Whether or not, without that inducement he would have become security, is not material. It is certain that if the engagement remains binding, he has been or may be greatly injured by the defendant's obtaining an injunction; and the question is whether he shall sustain that injury, or the defendant, who has done the wrong, be deprived of one part of his security? The Chancellor on this question cannot hesitate, and on the papers and proceedings in the cause does not perceive how he can do otherwise than decree a perpetual injunction. Decreed, that the injunction, before issued in this cause, be perpetual, but that each party pay his own costs.

From which decree the defendant appealed to this Court; and the standing under rule argument at this term, the appellant's behalf was suggested, and the case was entered abated. (*a*) *Bayly, Johnson*, (Attorney-General,) and *W. Dorsey*, for the appellant. *Key*, for the appellee.

It does not appear whether or not the entry of abatement in this case was made by the Court after argument, or by the counsel concerned. In the case of *Roche vs. Johnson et ux.* in this Court, sitting on the Eastern Circuit, it appeared that at June Term, 1806, the case was standing under rule argument, when the death of the plaintiff in error was suggested.

*Bayly*, for the defendant in error, submitted the question to the Court, whether or not, this case standing under rule argument, the death of the plaintiff in error abated the writ of error. He referred to the Acts of 1785, c. 1, and 1801, ch. 74, s. 38.

The COURT decided that the case did not come within the provision of the Acts of 1785, ch. 80, and 1801, ch. 74. But whether the writ of error abated, the case being under rule argument, the Court were not then prepared to decide, and the final decision of the question they postponed for further deliberation. Afterwards, at June Term, 1807, the Court decided, that a writ of error or appeal did not abate by the death of either party, if the case was standing under rule argument before the death was suggested. This opinion was made by the Court independent of the Act of November, 1806, c. 1, s. 11.

In an action on an administration bond, the defendant pleaded *performance*, to which the plaintiff replied *non-performance*, assigning as a breach the non-payment of a legacy bequeathed to the plaintiff. The defendant rejoined *no assets* and payment, to which the plaintiff sur-rejoined *assets* and *non-payment*. The defendant offered evidence to show that the testator, at the time of his death, had due to him about 1000*l.* the principal part of his personal estate, which sum was afterwards paid to the defendant, his executor, in depreciated continental currency, whereby a large part of the estate was lost; and the defendant further offered to show that he had proportionably, or nearly so, distributed the residue of the personal estate, among the legatees named in the will, *Held*, that such evidence was inadmissible.

In such an action, the burden of proof is on the plaintiff to show that the defendant had received assets. (*a*)

APPEAL from the General Court. An action of debt was brought on the testamentary bond, executed on the 8th of February, 1776, to the Lord Proprietary, on the estate of Edward Morgan, deceased, by the appellant, (the defendant in the Court below,) as his executor. The defendant pleaded performance, to which the plaintiffs replied non-performance, assigning breaches that the deceased, by his will, bequeathed to his daughter Elizabeth, the female plaintiff, £300 on her arrival at age, &c. with interest, &c. and he also bequeathed to his daughter Susanna, £300 on her arrival at age, &c. with interest, &c. that Susanna died intestate, whereby one-sixth part of the said legacy, amounting to £50, became by the testator's will due and payable to the said Elizabeth, &c. And that the executor had not paid the said legacies, &c. The defendant rejoined no assets, and payment in the following manner, viz:

"And the said R. M. saith, that the said D. S. and E. his wife, ought not to have or maintain their action aforesaid against him, by reason of any thing above by them in replying alleged, because he saith, that no goods or chattels, which were of the said E. M. at the time of his death, have come to, or been in the hands of him the said R. M. to be administered; and that he hath not in his hands to be administered, nor had he on the day of the impetration of the original writ in this cause, any assets, goods or chattels, which were of the said E. M. at the time of his death; and this he the said R. M. is ready to verify; wherefore he prays judgment, whether the said D. S. and E. his wife, their aforesaid action against him to have or maintain ought, &c. And the said R. M. as to the breach in the replication of them the said D. S. and E. his wife, above alleged, as

(*a*) See *Seighman vs. Marshall*, 17 Md. 550; *Burgess vs. Lloyd*, 7 Md. 196; *Wilson vs. Slade*, *post*, 281. As to actions on administration bonds for non-payment of pecuniary legacies, see *State vs. Wilson*, 38 Md. 388.



he non-payment of the said legacies, he saith, that the said D. and E. his wife, their aforesaid action against him to have or obtain, by any thing therein alleged, ought not, because he saith, after the arrival to age of the said E. to wit, on the, &c. he the R. M. paid to the said E. whilst she was sole, and before her marriage with the said D. the sum of £300, in form aforesaid bequeathed to her by the will of the said E. M. and the interest thereon due, as also the said sum of £50, the share or proportion of the said E. of the said £300 bequeathed to her as aforesaid, on the death of the said S. together with interest \* thereon due, to the said R. M. at Harford County aforesaid; and this he the said R. M. is ready to verify. Wherefore he prays judgment whether the said D. and E. his wife, to have or maintain their aforesaid action against him ought," &c.

which the plaintiffs sur-rejoined assets, and non-payment as theirs, viz: "And the said D. S. and E. his wife, as to the first order of the said R. M. above alleged, from having and maintaining their action aforesaid against him ought not to be precluded, because they say, that goods and chattels which were of the said D. S. at the time of his death, did come to the hands of him the R. M. to be administered, and that he hath in his hands to be administered; and had on the day of the impetration of the original writ in this cause, assets, goods and chattels, which were of the said D. S. at the time of his death; and this the said D. S. and E. his wife, pray may be inquired of by the country; and the said R. M. like manner, &c. And the said D. S. and E. his wife, as to the second rejoinder of the said R. M. above alleged, their action against him from having and maintaining, by any thing contained, ought not to be precluded, because they say, that after the arrival to age of the said E. to wit, on, &c. he the said R. M. did not pay to the said E. whilst she was sole, and before her marriage with the said D. S. the said sum of £300, in form aforesaid bequeathed to her by the will of the said E. M. and the interest thereon due, as also the said sum of £50, the share or proportion of the said E. of the said £300 bequeathed to the said E. on the death of the said S. together with the interest thereon due, to the said R. M. at Harford County aforesaid; and this the said D. S. and E. his wife, pray may be inquired of by the country; and the said R. M. like manner, and so forth."

The defendant at the trial at May Term, 1803, prayed the aid of the Court, and their direction to the jury, that before the defendant is bound to produce evidence on his part to prove that he has fully accounted for the estate of Edward Morgan, deceased, in the declaration mentioned, it was incumbent on the plaintiffs to prove that assets or personal property of the deceased had come to the hands of the defendant.

CHASE, Ch. J. (DONE, J. concurred. SPRIGG, J. dissented.) The Court are of opinion, that it is incumbent on the defendant to support the issues on his \* part, by proving that he had not assets to pay the legacies for which this suit is brought, or that he has paid the same, before plaintiffs adduce any proof to show that assets or personal property of Edward Morgan, had come to the hands of the defendant. The defendant excepted.

2. The defendant then offered in evidence, that Edward Morgan, the testator, resided in Harford County, having due to him at the time of his death, which happened in the year 1775, about £1,000 from different persons, which sum constituted, at the time of his death, the principal part of his personal estate, and which sum was afterwards, in the year 1779, paid to defendant, his executor, in depreciated continental currency, whereby a large part of the testator's personal estate was sunk and lost. The defendant further offered in evidence, that he, as executor, had equally and proportionably, or nearly so, distributed the residue of the personal estate among the different legatees named in the will of the testator.

CHASE, Ch. J. The Court are of opinion, that the evidence is inadmissible, and they refused to permit it to go to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued at the last term before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

Johnson, (Attorney-General,) and Magruder, for the appellant, in their arguments contended. 1. That on the issue to the rejoinder of no assets, the *onus probandi* was on the part of the plaintiffs below. 2. That if an executor neglected to return an inventory, he was not bound for all debts and legacies. 3. That the replication was defective, in not averring that there were assets sufficient to pay the legacies. They cited and relied on the Act of October, 1778, ch. 20. *Parson vs. Henry*, 5 T. R. 6; *Bull. N. P.* 140; *Erving vs. Peters*, 3 T. R. 688; *Orr vs. Kaines*, 2 Ves. 194; *Quynn vs. The State*, 1 H. & J. 36; *Atkins vs. Hill*, 1 Cowp. 284; 2 Com. Dig. 369, 458; *Swin.* 212, 229, 401, 420, 427; *Exp. Dig.* 261.

Martin, and T. Buchanan, for the appellees, in their arguments, contended, 1. That the plea of performance was an admission of assets, and the plaintiffs below were not bound to aver assets in the replication. 2. That the rejoinder \* of no assets was a departure from the plea of performance. 3. That the defendant could not, by his rejoinder to the replication, put in issue two separate and distinct facts. 4. Whether or not the plea of no assets was in effect the same as a plea of *plene administravit*? 5. That on the issue to a plea of *plene administravit*, the *onus probandi* was on the part of the defendant. 6. That if an executor neglected to

an inventory, he was answerable for all debts and legacies. After verdict it would be presumed that all essential evidence submitted to the jury. They cited and relied on *Sicin.* 401; 11 *Ab. tit. Executor*, 380, pl. 152; 2 *Show.* 163; 14 *Vin. Ab. tit. Inven-* 466; *Toth.* 183; *Godb.* 145, 146, 151; 12 *Mod.* 346; 3 *Blk. Com.* *Rushton vs. Aspinwall*, *Doug.* 683; *Roe vs. Haugh*, *Salk.* 29; *vs. Crofton*, 2 *Burr.* 890; *Sicin.* 212, 229, 401.

the Court of Appeals concurred in the opinion given by the General Court in the second bill of exceptions, but dissented from that in the first bill of exceptions.

*Judgment reversed, and procedendo awarded.*

### M'MECHAN vs. THE MAYOR, &c. OF BALTIMORE.

action on a bond given to the Mayor, &c. of Baltimore, in the name of a corporation for the use of A. where judgment was confessed, it should be considered that the suit was brought by the authority of the corporation, and a warrant of attorney need not be spread upon the record. (a) The Appellate Court cannot travel out of the record, but will make every necessary intendment in support of the judgment of the inferior Court.

judgment by confession is an admission of the right of the nominal plaintiff to recover the penalty of a bond having a collateral condition; and whether the judgment is in the right of the plaintiff, or for the use of another, is not material, and cannot be a cause for reversing it. (c) The Court will not so construe the recital in a bond as to defeat its operation and render it a nullity.

the Court of Assembly directing that an auctioneer shall give bond before he obtains a license, if the fact was that the license was obtained prior to execution of the bond. it was capable of proof, and in the power of the defendant to have availed himself of it on his plea of general performance, and insisting on that fact in his rejoinder to the plaintiff's declaration assigning the breach. (d)

the defendant is not answerable beyond his engagement.

it is not the practice in this State to require a warrant of attorney to appear. When the appearance of an attorney is entered on the record it is considered as done by the authority of the party. *Henck vs. Mer*, 7 H. & J. 275; *Ward vs. Hollins*, 14 Md. 158; *Dorsey vs. Kyle*, 30

the judgments of inferior Courts will not be reversed except for errors of law, and will be sustained by every fair legal intendment in favor of correctness. *State vs. Harrison*, 9 G. & J. 15; *Parrish vs. State*, 14 Md.

*Clark vs. Diggs*, 5 Gill, 109; *Huston vs. Ditto*, 20 Md. 305; Rev. Art. 64, sec. 125.

an action of debt on a bond with a collateral condition, where the defendant has pleaded general performance, and the plaintiff replied assigning each of the conditions, it is a departure for the defendant to allege in

Where a defendant, having pleaded general performance to a bond with a collateral condition, and without a replication on the part of the plaintiff assigning breaches, withdrew his plea, and confessed judgment—*Held*, that such judgment admits the plaintiff's claim to the extent of the penalty of the bond on which the action was brought. (a)

A repealing ordinance cannot destroy or affect any right which was acquired by any person under the first ordinance before its repeal.

A person who entrusted an auctioneer with the sale of goods, and has a claim against him for money arising on the sale, has a right to apply for and direct a suit on the auctioneer's bond for the recovery of his claim. (Note.) (b)

ERROR to the General Court. This was an action of debt brought the 8th of April, 1801, in the names of the defendants in error, for the use of A. Storey, on a writing obligatory bearing date the 23d of January, 1799, executed by Thomas Yates and Archibald Campbell, with David Stewart and the plaintiff in error, their sureties, to The Mayor and City Council of Baltimore, (the defendants in error,)

in the penal sum of \$30,000 current money, reciting, that  
**42** \* "whereas the above bound Thomas Yates and Archibald Campbell have obtained from the Mayor a license of admission, under the seal of the corporation, to use and exercise the trade or business of auctioneers; and by an ordinance of the corporation, persons obtaining such license are directed, before they enter upon the functions or duties of the office, to give bond for the faithful performance of the several trusts and duties required of them by the aforesaid ordinance;" and conditioned, "that if the above bound Thomas Yates and Archibald Campbell, do and shall pay and satisfy all just claims that may be against them as auctioneers, and shall

his rejoinder, matter which shows the bond never had any legal existence. *State vs. Dorsey*, 3 G. & J. 75.

(a) Affirmed in *Laidler vs. State*, 2 H. & G. 281, where it was held that a confession of judgment in an action on a bond supersedes the necessity of assigning breaches of the condition of the bond.

(b) In *Kiersted vs. State*, 1 G. & J. 248, the Court said that the question whether a party could sue on a bond with condition for the appearance of an insolvent debtor, made to the State as obligee, there being no provision in any of the insolvent Acts enabling third persons to sue on such bonds, was settled by the case in the text, and the case of *McMechen vs. Baltimore*, 3 H. & J. 584. These were suits on an auctioneer's bond, taken under an ordinance of the city which did not authorize any person in particular to sue on it, but the actions were sustained. The case in the text is also affirmed in *State vs. Norwood*, 12 Md. 177, where it was held that any person interested in a bond given by a public officer to the State, for the faithful discharge of official duties, may institute suit thereon in the name of the State, without authority expressly given for that purpose by the State. *McMechen vs. Mayor*, is examined in *Corporation vs. Young*, 10 Wheaton, 407, where it was held that no person who is not the obligee of a bond, or its assignee, can put it in suit, unless authorized so to do by the Legislature. It is not enough that a breach of the bond has damnified the person who brings the suit.

will faithfully execute the office and employment of auctioneers, in all things well and faithfully perform the several duties required of them by the ordinance, entitled, An Ordinance for licensing and regulating auctions within the City of Baltimore and parts thereof, then this obligation to be void, otherwise to be and remain in full force and virtue." Which bond was endorsed, "Approved, January 24th, 1799. James Calhoun, Mayor of the City of Baltimore." The defendant in the Court below pleaded general performance; but afterwards relinquished his averment, and confessed judgment, which was entered for the amount of the penalty in the bond, the debt in the declaration mentioned, and costs; and which judgment was to be released on payment of \$4,154.30, with interest thereon from the 1st of January, 1800, and costs. The defendant afterwards brought the present writ of error.

The cause was argued before CHASE, Ch. J. BUCHANAN and MILLER, JJ.

*Mechen*, for the plaintiff in error, contended, that it did not appear by the record that there was any authority from the Mayor and City Council of Baltimore to authorize any person to prosecute a corporation. A corporate body cannot appear in person, or by attorney to prosecute or defend a suit, unless by letter of attorney under corporate seal. 1 *Blk. Com.* 502, 503. That a writ of *certiorari* should be granted in this case, fully appears in *Lill. Ent.* 227, 253, 556, 558, 560.

And *Harper*, for the defendants in error. The writ of *certiorari* is not to be granted for the purpose alleged. The practice of our Court is to consider the appearance of an attorney for either party regular, and that he had sufficient authority to do so. In the case of a common person it has always been so considered, and there is no reason why it should be otherwise in the case of a corporate

CHASE, Ch. J. The Court consider that it is not necessary to spread the warrant of attorney on the record. Every appearance will be intended in support of the judgment, unless the contrary appears. 44

*Mechen*, for the plaintiff in error, then contended—1. That the writ was not taken in conformity to the ordinance of the Mayor and City Council of Baltimore of the 12th of December, 1798, but was taken into after, instead of before the license was granted. *The Mayor &c. of Chittinston vs. Penhurst*, 1 *Salk.* 475, and *Rex vs. Courp.* 26.

That the ordinance, under which the bond was taken, was enacted previous to the bringing this action; and as the repealing Act saved no rights, the action could not be supported. Act

of 1796, ch. 68, s. 8; *Miller's Case*, 1 W. Blk. Rep. 451; 6 Bac. Ab. tit. Statute, (D.) 372, and *Rex vs. The Justices of London*, 3 Burr. 1456.

3. That this action is stated to be brought in the names of The Mayor and City Council of Baltimore, at the instance and for the use of Alexander Storey. *Martyn vs. Hind*, 1 Doug. 142; the Acts of Assembly, October, 1780, ch. 30; May, 1781, ch. 11; 1784, ch. 61; 1790, ch. 12; and 1796, ch. 68.

4. That in a suit on a bond against a surety, it must be shown that he is bound. That a surety is not bound beyond the scope and extent of his engagement, which are confined to the strict letter of the bond. *Wright vs. Russell*, 3 Wils. 530; *Sloss vs. Galloway*, 3 H. & McH. 204; *The State vs. Wailes*, *Ibid*, 241; *Straton vs. Rastall*, 2 T. R. 366; *Quynn vs. The State*, 1 H. & J. 36.

\* 5. That there was no replication assigning the breaches; **45** and that the confession of judgment did not cure the defect. *Quynn vs. The State*, 1 H. & J. 36; *Hardy vs. Moore's Ex'rs*, 3 H. & McH. 389; *Bowie vs. The State*, *Ibid*, 408; *Dorsey vs. Stevenson's Adm'r*, 4 H. & McH. 351; *Green's Adm'r vs. Couden's Adm'r*, *Ibid*, 352.

*Key and Harper*, for the defendants in error.

CHASE, Ch. J. delivered the opinion of the Court. The Court cannot travel out of the record, but will make every necessary intendment in support of the judgment of the inferior Court. (a)

The judgment by confession is an admission of the right of The Mayor and City Council of Baltimore to recover the penalty of the bond; and whether it is in their own right, or for the use of another, is not material, and cannot be a cause of reversing the judgment.

According to the record, and the nature of the transaction as disclosed by it, the legal and necessary intendment is, that the bond and license were given on the same day, and that the execution of the bond preceded the granting of the license, because the nature of the transaction required it.

The Court cannot so construe the recital in the bond as to defeat its operation, and render it a nullity; such an exposition would be a violation of the plainest principles of law and justice.

If the fact was, that the license was obtained prior to the execution of the bond, it was capable of proof, and in the power of the plaintiff in error to have availed himself of it, by retaining his plea of general performance, and insisting on that fact in his rejoinder to the replication of the defendants in error assigning the breach.

That the security is not answerable beyond his engagement, is a position that cannot be controverted.

(a) If by any means whatever the plaintiff can be supposed to have a title as laid in the declaration, as this is, after verdict, we will hold this judgment right, and there is no inconsistency. 1 Wils. 1; 3 Burr. 1725, 7.

this case the plaintiff in error, as security, reposed a confidence in the principals, the auctioneers, and not in the mayor; and actually judged that the auctioneers should pay and satisfy all just claims against them as auctioneers; \* and the judgment, by confessing, admits the claim of the Mayor and City Council of Baltimore, against the plaintiff in error, to the extent of the penalty of the bond, subject to the release on the record. The repealing ordinance cannot destroy or affect any right which was acquired by any person under the first ordinance before the passage thereof.

*Judgment affirmed. (a)*

#### HAFFNER'S DEVISEES *vs.* DICKSON'S HEIR.

specific performance of a bond for conveying a tract of land executed in 1764, decreed on a bill filed in 1792.

The decree in favor of the complainant, but without costs, was, on appeal by the defendant, reversed as to the costs, and affirmed as to the residue; and it was decreed that the complainant should recover his costs in both courts.

ARISE from a decree of the Court of Chancery. The bill was filed by the present appellee, (the complainant in the Court of Chancery) on the 9th of July, 1792, against Frederick Haffner, who died without answering the bill, and a bill of revivor was afterwards, in 1796, filed against his sons and devisees, the present appellants.

The facts stated in the original bill, bill of revivor, and in an amended bill, are, that Frederick Haffner, on the 11th of May, 1764, entered into a bond to James Dickson, the brother of the complainant, conditioned, that if Haffner, his heirs, &c. "do and shall lawfully and truly convey and make over unto the above named James Dickson, his heirs, &c. by a good and sufficient deed, of one full half acre of Resurvey on the Discovery, and now patented and called Frederick's Choice, on or before the first day of July next ensuing the date hereof, then," &c. At the foot of the bond, and before the signature of the obligor, it was thus written: "It is to be remembered, that, at the signing and sealing, it is agreed, that out of the above tract of land there shall be laid off for Daniel Maddes, and then one-half of the remainder is to be conveyed to James Dickson." That the land

The Court were also of opinion, (though as this point was not before them they omitted it in the written opinion which was delivered,) that the person who entrusted the auctioneers with the sale of goods, and had a claim against them for money arising on the sale of the goods, has a right to apply to the Mayor and City Council to direct a suit to be instituted on behalf of the auctioneers for the recovery of his claim, and the corporation should not, consistent with their duty under the ordinance, refuse such application, and might be enjoined, by suit in Chancery, to allow the person to use their name to prosecute his claim.

is called and designated in the bond of conveyance by a wrong name. That Haffner originally, on the 10th of November, 1752, obtained a grant for 45 acres of land, \* called Havanaer's Discovery.

**47** That a warrant afterwards issued on the 1st of February, 1760, and renewed the 22d of September, 1761, to resurvey the land under the name of Haverner's Discovery. That a certificate was returned, dated on the 10th of December, 1761, and patent issued to Haffner for the land by the name of The Resurvey on Havenear's Fancy, on the 29th of September, 1762. That by the table of courses annexed to the certificate of the The Resurvey on Havenear's Fancy, it appears that Haverner's Discovery was the land resurveyed; and by the rent rolls it appears that The Resurvey on Havanor's Fancy was originally called Havanor's Discovery, and contained 45 acres. That the land patented under the name of The Resurvey on Havenear's Fancy, and the land which Haffner obliged himself to convey by the bond of conveyance, is one and the same tract of land, and not different. That Haffner, being seized and possessed of the land, came to an agreement with Dickson relative to the sale of a moiety of the same, deducting 100 acres, and that Dickson paid the full amount of the purchase money agreed on, and in consideration thereof, Haffner executed the bond to convey the moiety to Dickson in fee simple. That Dickson died, after the payment of the purchase money, and the date of the bond, in possession of a moiety of the land, and left the complainant his heir at law, who is in equity and justice entitled to a conveyance thereof, pursuant to the bond. That Haffner is since dead, having by his will devised the land, of which the complainant claims part, to his sons, the defendants, in fee simple, as tenants in common, &c. Prayer—that it be decreed that the defendants convey a moiety of the land, according to the bond to the complainant, in fee simple, together with such further and other relief in the premises as complainant's case, may deserve, &c. The answers of the defendants state, that their father did own a tract of land called Havenear's Discovery, but no warrant of resurvey was obtained by him to resurvey that tract; but it was to resurvey Havenar's Fancy, and under that warrant a survey was made, a certificate returned, and a patent granted to their father, for a tract of land called The Resurvey on Havenear's Fancy, containing 695 acres, of which their father was seized and possessed until his death; and since his death the defendants have been in the seizin and possession, are now seized and possessed ' thereof.

**48** That they were not privy to the contract entered into between their father and Dickson, and only know what land he sold to Dickson, if any, from the papers exhibited by the complainant; and they do not know, nor can they admit, that it was any part of The Resurvey on Havenear's Fancy, for the conveyance of which the bond was given. That they understood from their father, that having executed a survey many years ago, he included more land



therein than he thought himself able to pay for in the land office, and therefore agreed with Dickson to let him have half the land so taken up, provided he would pay half the caution money, and other expenses attending the securing and making perfect the title to the same. That they often heard their father say, that it was in consequence of this agreement, and upon no other consideration whatsoever, that he passed his bond to Dickson for the conveyance of certain lands in the bond mentioned, but which bond they have never seen. That they have been informed, &c. that when the certificate of survey for the land thus contracted for was returned to the land office, Dickson was either unable or unwilling to pay his proportion or dividend of the expenses necessary to secure the land; and that their father was compelled so to do, and did actually make sacrifices to borrow and procure the money to secure the land, and did actually pay for the whole himself; and that their father never did receive from Dickson any valuable, or other consideration, for the bond which he executed in manner aforesaid. That they have also understood from their father, that no writing of any kind ever passed to him from Dickson, respecting the land; that their father, being an illiterate man, and reposing great confidence in Dickson, took no writing from him on the business. They do not believe that Dickson ever had possession of any lands whatsoever in consequence of the bond; on the contrary, they have been informed, &c. that Dickson, well knowing he was not entitled to have a conveyance, &c. never did, during his whole life-time, ask their father to convey, &c. They insist upon the Act of Parliament, or Statute of Limitations, made in the 21st year of the reign of King James I, and pray the benefit of that Act. That after the great length of time which hath elapsed since the execution of the bond, and before any bill filed to obtain a specific performance thereof, they are informed the complainant is not \* entitled to relief, and they rely on the said length of time to bar the complainant of the relief prayed, **49** and pray to have the benefit thereof at the hearing, as fully as if they had pleaded the same, and relied thereon by way of plea, &c.

Commissions were issued, and testimony taken thereunder, proving the hands-writing of the witnesses to the bond, who were dead. That a warrant of resurvey was taken out on the 27th of November, 1784, in the joint names of Haffner and Dickson, at their request, to resurvey a tract of land called Haffner's Fancy, but which was not executed. That the complainant was brother and heir at law of Dickson. That in the year 1784, on executing a commission to perpetuate the bounds of the land called The Resurvey on Havaner's Fancy, issued by and in the name of Frederick Havaner, the complainant claimed a conveyance for his share of the land of Haffner, according to the bond which he exhibited to Haffner, executed by him to Dickson; that Haffner acknowledged it, and said Dickson had paid all the money that could in justice be demanded of him

for his part of the land. That Haffner, in stating objections to his conveying the land, said he had paid taxes on it. That as there was some dispute about some part of the land, and as it was intended by both to sell, it was finally agreed to wait the result of that dispute. That at another time the complainant called on Haffner for a conveyance of one-half of the land Haffner then lived on, who alleged he had paid taxes, &c. as much as he thought the land was worth. That complainant proposed to make him payment for all the money he had advanced on the land, on his making a conveyance, which Haffner refused to do. That Haffner admitted that the land he lived on was the land the complainant was entitled to, if he was entitled to any, and is the same land mentioned in the bond of conveyance, and that it is a tract of land called The Resurvey of Havenear's Fancy. That Haffner afterwards promised to settle the business in a peaceable manner as soon as he settled some dispute about the land with one Shehawn.

HANSON, C. (July 19th, 1803.) This cause coming on to be heard, was most ably debated by the counsel on each side. The Chancellor has never heard a cause which appeared to him more difficult to decide, so as to secure an affirmance by the Court of Appeals. However the \* Chancellor may differ in sentiment from that tribunal, he has always considered it his duty to determine according to their known opinion. But in various causes, which have been carried to that tribunal, and in which the question was, whether or not an agreement respecting land should be enforced, they have decided, without laying down their principles for the future government of the Chancellor. In the present instance, if he could divine how the Court of Appeals would decide, he would certainly decide accordingly, as indeed he would in every other case. Sometimes it has appeared to him that the Court of Appeals has considered it proper to enforce almost any agreement whatever. At other times it has appeared to him that they have adopted a strictness beyond any thing to be met with in the books.

That the agreement which Dickson prays this Court to enforce, is uncertain, and that it has lain so long dormant, as to have no title, agreeably to established principles, to be enforced, has been contended on the part of the defendants. It is also on their part contended, that there is no sufficient proof of its having been performed on the part of James Dickson, under whom the complainant claims. If the defendants are right, the complainant is not entitled to relief. But the complainant denies every allegation, and the parties are at issue upon them.

It has always been a practice of the Chancellor, and he probably will always consider it right, where a cause is doubtful to himself, where his decision, whatever it may be, is in his own opinion just as likely to be reversed as to be affirmed, and where he can propose

such a compromise as appears to him likely to coincide with the judgment of honest sensible arbitrators, chosen by the parties, it has always, in such cases, been his practice to propose that a decree pass by consent, which shall at once end all controversy.

In the present case he proposes that the parties agree, by writing here filed, that a decree pass to the following effect: 1. That each party bear his own costs. 2. That the defendants convey to the complainant two-thirds of the land in question; that is to say, two-thirds of what the complainant claims; or that the said land be sold by a trustee, appointed by the Chancellor, who shall act under the Chancellor's control, and report his sale, which shall not \* be valid until ratified by the Chancellor, and who shall receive a **51** commission as in similar cases; and that the net proceeds shall be divided between the complainant and the defendants, two-thirds to the complainant, and the other third to the defendants. 3. The complainant shall release to the defendants all claim to profits on the land by him claimed.

The Chancellor requests that a copy of this recommendation be served by the complainant on the defendants, unless he, (the complainant,) disapproves of it. If he shall declare in writing to the Chancellor his disapprobation, or if the defendants, on being served, shall not, within one calendar month after service, express their approbation, the Chancellor will proceed to decree to the best of his judgment. The complainant is requested to decide as early as conveniently may be.

HANSON, C. (August 1st, 1803.) The complainant having by his petition to the Chancellor, and filed in the cause, agreed to waive all right to a decree to account for the rents and profits of the land in controversy, reserving to himself all right and equity to an account of those rents and profits in any future bill for an account for the same, Decreed, that the defendants shall forthwith, by a deed or deeds of bargain and sale, to be duly executed, acknowledged and recorded, convey unto the complainant, and his heirs, as tenant in common, one undivided moiety or half part of, in and to, all that tract of land in Frederick County called The Resurvey on Havenear's Fancy, which was originally granted unto Frederick Havenear, now deceased, by patent bearing date on the 29th day of September, 1762; provided always, and liberty is hereby reserved unto the complainant, to file a new bill or bills against the defendants for an account of the rents and profits of the said land; and also reserving to the complainant all equity which he now hath or may have to an account of the said rents and profits; the Chancellor so decreeing, because the complainant hath filed a writing to that purpose, and the Chancellor, therefore, being excused from giving any opinion on the subject of profits. Also decreed, that the defendants and the complainant shall each bear his own costs in this suit expended.

**52** \* In decreeing thus, the Chancellor flatters himself, that he pursues the opinion of the Court of Appeals, or rather the principles which must be supposed to have governed them in the late case of *Broune vs. Broune*, 1 H. & J. 430; and he takes the liberty of referring to his own recommendation in this Court filed, which, as he was informed by the complainant's counsel, would be rejected by the complainant. He repeats, that in decreeing, as he does, he conceives that he pursues the principles which governed the Court of Appeals in the recent cause of *Broune vs. Broune*, in which his decree was reversed. He may be mistaken with respect to those principles, which indeed the Court of Appeals has not explained; but he flatters himself that the important tribunal of the Court of Appeals, on reflection, will perceive the propriety of always explaining the grounds on which they reverse a decree, in order that the Chancellor may in all future causes obey them, as his duty requires him to do. It is notorious, that in many causes a variety of points of law and equity are disputed between the parties; a simple affirmance or reversal does not, cannot inform the Chancellor on which of the points they have decided the cause.

From which decree the defendants appealed to this Court, and the cause was argued before CHASE, Ch. J. BUCHANAN and GANTT, JJ.

*Johnson*, (Attorney-General,) for the appellant, contended, 1. That it was not a matter of course to decree a specific performance of a contract. 2 *Pow. on Cont.* 221, 233, 242; 2 *Vern.* 415; 2 *Com. Dig. tit. Chancery*, (2 C. 16;) *Buxton vs. Lister*, 3 *Atk.* 383. 2. That the length of time, before the application for relief, ought to prevent its being granted. 2 *Pow. on Cont.* 260.

*Key*, for the appellee, cited *Peake's Evid.* 56. 57.

The Court of Appeals, decreed, "that the decree of the Chancellor, so far as the same relates to the costs in the Court of Chancery, be and the same is hereby reversed; and that the appellee recover against the appellants the costs by him expended in the Court of Chancery." Also \* decreed, "that the residue of the said

**53** decree be and the same is hereby affirmed, except so far as the said decree operates to compel the appellants to convey any interest in the one hundred acres of land to be laid off for Daniel Maddes, mentioned at the bottom of the condition of the bond executed by Frederick Haffner to James Dickson, dated the 11th of May, 1764, and exhibited in the bill filed in the cause; and as to the said one hundred acres of land, the said decree is reversed."

"And for the purpose of carrying this decree into effect," it was further decreed "that the Chancellor pass a decree, thereby directing the appellants forthwith, by a deed or deeds of bargain and sale, to be duly executed, acknowledged and recorded, to convey unto the appellee, and his heirs, as tenant in common, one undivided

moiety or half part of, in and to, all that tract of land, lying in Frederick County, called The Resurvey on Havenar's Fancy, which was originally granted unto Frederick Havenear, now deceased, by patent, bearing date on the 29th day of September, 1762, except one hundred acres of the said land, stated on the bond of conveyance executed by the said Frederick Haffner to James Dickson, dated the 11th of May, 1764, and exhibited in the bill in this cause, to be laid off for Daniel Maddes; and the deed or deeds to be executed in pursuance of the said decree, to contain an exception as to the said one hundred acres. And by the said decree, the Chancellor shall direct the said appellants, to pay to the said appellee, the costs in the Court of Chancery." And it was further decreed, "that the appellee recover against the appellants the costs by him expended in this Court."

#### KEEFER vs. YOUNG.

Parol evidence admitted to prove that the land granted to the husband of a demandant, is the same land of which dower is demanded.

In an action of dower it is not necessary to lay any damages in the declaration. (*note.*) (a)

A demurrer to the declaration being overruled, judgment was entered for dower and costs. (*note.*) (b)

APPEAL from Frederick County Court. An action of dower was brought by the present appellant, who was the wife of Bartle Keefer, deceased, "for the third part of 50 acres of land, with the appurtenances, lying and being in Frederick County, consisting of part of a tract of land called Ohio, and part of a tract of land called Wertimburgh, which she claims as her dower of the endowment of the said Bartle Keefer, her late husband," &c. The defendant pleaded. 1st. That Bartle Keefer was not seized, &c. And 2d. \* That he was alive at the time of the impetration of the writ. Issue 54 was joined to the first plea; and replication that Bartle Keefer was not alive at the time, &c. as to the other plea, and issue joined.

1. The demandant, at the trial, to prove that Bartle Keefer was seized of the tract of land called Wertimburgh, offered in evidence a patent of a tract of land called Wertimburgh, granted to Bartle Keefer on the 17th of July, 1765; and proved that the patentee of Wertimburgh, entered upon the land, and was seized thereof, as the law requires. She then offered a patent for a tract of land called Whiterback, granted to George Haiman on the 13th of November, 1759, for 27 acres; and that the patentee entered upon the land, and was seized thereof as the law requires. Also a deed from George

(a) See *Evans' Prac.* 219.

(b) See *Grove vs. Todd*, 45 Md. 258.

Herman, the patentee of Whiterback, to Bartel Ceefer, dated the 20th of August, 1765. And that the grantee entered upon the land, in the deed mentioned, and was seized thereof as the law requires. And she offered to prove that the grantee, in the deed last mentioned, and the patentee in the patent of Wertinburgh, was the same, and not divers or different persons; and that the land called Wertinburgh in the patent, and the land called Wertimburgh in the declaration mentioned, is the same land, and not divers; and that George Hainman, the patentee of the tract of land called Wertimburgh, and the grantee in the deed before referred to, is the same person and not divers. She also proved that Bartle Keefer was seized in his demesne as of fee of the said tract of land called Wertinburgh, and that he died seized thereof in the year 1777, and before the impleading of the original writ in this cause. She also proved that she was the wife of Bartle Keefer, lawfully accoupled in holy matrimony. She then offered parol evidence to prove, that the tenant in this action holds the land called Wertimburgh, and the part of Ohio, conveyed as aforesaid to Bartle Keefer, claiming the same under the heirs of Bartle Keefer. The defendant then prayed the opinion of the Court, and their direction to the jury, that the evidence on the part of the demandant did not support the declaration, and that the demandant could not recover the same. Of which opinion the County Court, [CLAGETT, Ch. J. and SHERIVER, A. J.] were, and so directed the jury. The demandant excepted.

**55** \* 2. The demandant then prayed the opinion of the Court, that on the issues joined in this cause, she hath shown good title to recover her dower of the tract of land called Wertimburgh, in the declaration named; which opinion the County Court refused to give. The demandant excepted; and the verdicts and judgment being for the defendant, she appealed to this Court.

*Shaaff and Brooke*, for the appellant, cited 2 *Inst.* 286; 10 *Coke*, 117, *Pilford's Case*.

*Taney* and *F. S. Key*, for the appellee.

The Court of Appeals reversed the judgment of the County Court, disagreeing with that Court in the opinions expressed in both of the bills of exception.

*Procedendo awarded.* (a)

(a) Neither in this case, nor in that of *Keefer vs. Marker*, were any damages laid in the declaration. The case of *Keefer vs. Marker*, was also an appeal from Frederick County Court, in an action of dower. To the declaration there was a general demurrer, and joinder in demurrer, and the County Court ruled the demurrer good, and gave judgment for the defendant; from which judgment the demandant appealed to this Court. And at this term the Court of Appeals reversed the judgment, and entered a judgment for the demandant for dower and costs.

DANNISON *vs.* ROBINETT *et al.*

Where a person, having the equitable interest in land, is in possession, yet if such interest is not known, it will not prevail, if established, over the legal estate commencing subsequent to the equitable interest. (a)

APPEAL from a decree of the Court of Chancery, dismissing the bill of complaint of the present appellant. The bill states, that William Smith, one of the defendants, being seized in fee of a tract of land called Sugar Tree Camp, lying in Washington County, containing 100 acres, mortgaged the same to James Bryant in 1788, in consideration of his having paid debts for him to the amount of £39. That Smith had three sons, named Christian, Philip and Peter, (also defendants,) and he was indebted to Christian in the sum of £109 13 10, as ascertained by a settlement made between them on the 22d of May, 1789. That he had no means to discharge the debt, except by a sale of his equity of redemption in the land. That it was agreed between the father and his sons that the former should sell to them the land, and a bond of conveyance was executed for the purpose dated the 22d of May, 1789. And it was also agreed, that on the sons Philip and Peter, paying to \* Christian two-thirds of the debt due to him, they were equally to have the 56 land. From the time of the contract, to the year 1793, the three sons possessed the land. While they were in possession, Moses Robinet, (another defendant,) who had a knowledge of their equitable right, purchased the same land from William Smith, and obtained a deed, dated the 8th of October, 1793. That Peter, one of the sons, was induced by Robinett to believe his title was invalid, and he contracted with him for the same for the sum of £15, for which a note was given, but the money has never been paid. That Joshua Wilson (another defendant,) paid to James Bryant the money due on the mortgage, and obtained an assignment of the same. That Robinett, having obtained the deed, applied to two magistrates for a writ of forcible entry and detainer, availing himself of a period when the sons could obtain no counsel, and they were induced to believe they would be turned out of possession, and therefore gave up the possession. That the magistrates who attended were those before whom the deed was executed, and one of them the agent of Robinett. That on the 29th of November, 1793, Joshua and Isaac Wilson, (also defendants,) in consideration of \$20 paid to Christian Smith, obtained an assignment of his interest in the bond of conveyance, and on the 19th of June, 1794, for the like sum paid by Dannison, (the complainant,) re-assigned the bond to him. That Peter Smith, on the 1st of March, 1794, and Philip Smith, on the

(a) See *Moncrieff vs. Goldsborough*, 4 H. & McH. 178, note (c.)

18th of April, 1794, assigned their interests in the bond to the complainant for the like consideration. That Robinett, after he obtained the deed, paid to Joshua Wilson the money he had paid on the mortgage, and received an assignment. That the complainant tendered to Robinett the principal and interest due on the mortgage, and tendered and claimed a conveyance, but that Robinett refused to receive the money, or execute the deed. The object of the bill was to obtain that conveyance, and for Robinett to account for the profits of the land from the time he took possession of it.

The answers of all the defendants, except Robinett, admit the facts stated in the bill. He does not admit the debt to the sons, nor the bond of conveyance, or his knowledge of the same, if it did exist, before the deed to himself.

**57** \* The complainant offered in evidence sundry depositions of witnesses, taken under a commission issued from the Court of Chancery, to prove—1. The execution of the bond of conveyance. 2. The consideration, possession, and notice to Robinett. 3. The assignments executed by the three sons of William Smith to the complainant.

HANSON, C. (October Term, 1803.) The answer of the principal defendant, who is called on to convey, &c. expressly denies knowledge of an equitable title in the persons under whom the complainant claims, and there is not testimony, which, according to the principles of this Court, is sufficient to refute the answer, taking the whole of the testimony into consideration. Decreed, that the bill be dismissed, but without costs. From which decree the complainant appealed to this Court.

The cause was argued in this Court before CHASE, Ch. J. TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Johnson*, (Attorney-General,) for the appellant, contended—1. That a prior equitable right to land will prevail over a legal title acquired with a knowledge of that equitable right. 2. That where the person having the equitable interest is in possession of the land, there, although in fact his equitable interest is not known, still it will prevail, when established, over the legal estate commencing subsequent to the equitable interest. In other words, the possession alone will exclude the legal right from being protected, on the ground of being ignorant of the equitable right. 2 *Fonbl.* 155, (*note m*); *Smith vs. Low*, 1 *Atk.* 490; and 1 *Pow. on Cont.* 302. 3. That the appellant may recover two-thirds; that is, the proportions of Christian and Philip, supposing the conduct of Peter may exclude him, or his assignee, from the recovery of the other third. 4. That if Peter, at the time of the conveyance from William Smith, was ignorant of his right, and that Robinett, or his agent, contributed to induce him to the belief that he had no right, his one-third may be recovered.



5. That the assignee of Christian alone is entitled to a conveyance of the whole land, until Peter, or his assignee, pays his portion of the debt.

\* 6. That the appellant is entitled to an account of the profits to sink the mortgage debt. He referred to *Jarrett vs. West*, in this Court. 58

*Shaaff*, for the appellees. An agreement, to merit the interposition of a Court of equity in its favor, must be fair, reasonable, *bona fide*, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary, free from fraud, &c. 2 *Pow. on Cont.* 221. The Chancellor decreed in this case, upon the ground that notice was not sufficiently proved. And in support of the decree dismissing the bill, it is contended—1. That there was no contract proved. 2. If there was a contract, it was a voluntary and fraudulent one. 3. The bill has not charged any thing like notice to Robinett. 1 *Pow. on Cont.* 302; *Butcher vs. Stapely*, 1 *Vern.* 365; *Borret vs. Gomeserra*, *Bunb. Rep.* 94; 2 *Eq. Ca. Ab.* 17, 48.

The Court of Appeals affirmed the decree of the Court of Chancery.

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WORTHINGTON *et al.* *vs.* BICKNELL.

A. executed a mortgage to B. of real and personal property, to secure the payment of a sum in the then current money, and it was afterwards agreed between them, that the personal property should be released, on A's endorsing on the mortgage that it was a specie debt. A. afterwards conveyed his equity of redemption in the real estate to C. who, on the representations of B. of the sum due on the mortgage, and that it should not be released unless C. executed to him his bond for that sum, did accordingly execute such bond; on which a suit at law was brought, and judgment rendered thereon. On a bill in Chancery by C. an injunction was obtained to stay proceedings at law. The auditor was ordered to state the mortgage debt in continental money, reducing it into specie at 5 for 1, with interest, and credit the payments made; and on such statement it appeared that the debt was overpaid. Decreed, that the injunction be perpetual.

Parol evidence admitted to prove, that a debt secured by a mortgage was continental money, although expressed to be a specie debt.

Where there is a mortgage, with a personal covenant by the mortgagor that he will pay the money, and he assigns his equity of redemption, is he a competent witness for the assignee to prove that the money loaned was continental money? *Quere.*

The assignee of a mortgage is entitled to the same relief that the mortgagor would have been entitled to against the mortgagee.

A decree in favor of the complainant, but without costs, was on appeal by the defendant, reversed as to costs, and affirmed as to the residue; and decreed that the complainant should recover his costs in both Courts.

APPEAL from a decree of the Court of Chancery. The bill, filed by the present appellees in 1801, stated that \* Richard Robinson, being seized in fee of several tracts of land, on the 1st of May, 1778, borrowed £170 of the then current money, of B. T. B. Worthington, whose executors and representatives the appellants are, and executed a mortgage of his said lands, and sundry slaves, &c. for the payment of the said sum of money, with interest thereon, on the 1st of September then next ensuing. That Robinson being about to leave the State, on the 6th of October, 1782, applied to Worthington to release the personal property mortgaged, as the land was amply sufficient for the payment of the mortgage debt, which he refused to do unless Robinson would endorse on the mortgage the sum of money then due in gold and silver, which he agreed to, and the sum then stated to be due was £145 3 3 gold and silver, current money. That on the 15th of October, 1782, Robinson assigned all his right, and equity of redemption in the mortgaged premises, to Ninian Riggs. That Robinson, after the mortgage, became indebted to the complainant, Bicknell, for money actually paid and advanced. That Robinson, in consideration thereof, and in consequence of a contract between the complainant and Riggs, agreed that the right of redemption in the mortgaged premises should be conveyed to the complainant, and a deed was accordingly executed. That the complainant having obtained the conveyance, and being interested in the payment of the mortgage debt, was applied to by Worthington on the subject, who represented to the complainant that there was then due from Robinson to him, for principal and interest, the sum of £171 6 0, on the 26th of February, 1791, and that the complainant could not and should not obtain the benefit of the equity of redemption by a release of the mortgage, unless he gave him his bond for that sum of money; and that the complainant, confiding in the representations of Worthington, gave his bond accordingly. That Worthington is since dead, and J. Worthington, one of the defendants, is his executor, who has brought an action at law on the bond, and obtained a judgment. That the executor, and the other defendants, on the 25th of July, 1795, filed a bill against Robinson, Riggs, and the complainant, for a sale or foreclosure of the equity of redemption of the mortgaged premises. That by the answers to that bill, and the evidence taken, it appears that the sum loaned by Worthington to Robinson, and the mortgage taken, was to \* secure the payment of continental money, and that the

**59** sum due, calculating its worth by the scale of depreciation, with legal interest, had been paid off or reduced to the sum of £9 5 2 current money, on the 13th of December, 1798. That the executor of Worthington is indebted to the complainant in the sum of £13 17 6, current money, for articles charged in the account exhibited. Prayer for a perpetual injunction against execution issuing

**60**

on the judgment at law, and to compel a release of the mortgaged premises, &c.

On the coming in of the answers, and on the testimony taken in the cause, amongst which was that of Robinson, the auditor was directed to state an account between the parties. He made various statements, to which both parties excepted, and by the Chancellor's order he made one, wherein the money loaned to Robinson on the mortgage, viz. £170 continental money, was charged against Bicknell at five for one, with the interest thereon, and after crediting payment made at various times, and the costs on the bill filed by the executors, &c. of Worthington, which they had dismissed, left a balance due to the complainant, on the 1st of March, 1804, of £10 1 11, current money.

HANSON, C. (7th March, 1804,) decreed, that the injunction issued be perpetual; and that each party pay his own costs, &c. From this decree the defendants appealed to this Court.

The cause was argued before CHASE, Ch. J. BUCHANAN and NICHOLSON, JJ.

*Ridgely*, for the appellants, contended, 1. That all the necessary and proper parties are not before the Court. *Hind's Prac.* 2; 2 *Eq. Ab.* 170; *Pre. in Chan.* 83. 2. That Bicknell is not entitled to relief on account of the transaction between Robinson and Worthington, because he is no party to the contract, and has no privity of interest, he not representing Robinson. 3. That if Bicknell has privity of interest, and is entitled to Robinson's equity, yet there is no legal testimony in the cause to prove the facts alleged in the bill, because Robinson, the only person produced as a witness, is incompetent \* on two grounds, 1st. He is interested, because there is a personal covenant in his mortgage to Worthington, that he will pay the money; and 2d. Because he is swearing to impeach the security he gave, and to invalidate his own act and deed. *Gilb. L. E.* 122; *Hesketh vs. Braddock*, 3 *Burr.* 1856; *Walton vs. Shelly*, 1 *T. R.* 296; *Buckland vs. Tankard*, 5 *T. R.* 578; *Goodlittle vs. Bailey*, *Coup.* 600; 1 *Fonbl.* 188; 1 *Harr. Chan.* 305, 613. 61

*Johnson*, (Attorney-General,) for the appellee, referred to *Piddock vs. Brown et al.* 3 *P. Wms.* 289; 2 *Com. Dig.* 96.

The Court of Appeals decreed, that so much of the decree of the the Chancellor, as granted a perpetual injunction on the judgment in the bill and proceedings mentioned, be affirmed; and that that part of the said decree, by which each party was to pay his own costs, be reversed; and also decreed, that the appellants pay to the appellee all the costs incurred by him in the Court of Chancery, and in this Court.

## POLLITT vs. PARSONS.

Property acquired by an insolvent debtor, after he has been legally discharged under the insolvent law of 1774, ch. 28, otherwise than "by descent, gift, devise, bequest or in a course of distribution," is not liable for debts contracted prior to his discharge; and if it is liable, it cannot be affected by a *fiery facias*, without a *scire facias* having previously issued, if a year and a day has elapsed.

APPEAL from the General Court from a judgment of affirmance on an appeal to that Court from Worcester County Court. The plaintiff in the County Court, (now appellee,) brought an action of trespass *vi et armis* against the defendant, (the appellant,) for taking his goods and chattels, and converting them, &c. By a statement of the facts submitted to the Court for their opinion, it appears that Samuel Smyly obtained a judgment in the General Court against Parsons. After which judgment Parsons was, on the 13th of November, 1801, regularly discharged under the Act for the relief of insolvent debtors, passed in 1774, ch. 28. That afterwards, in 1803, a writ of *fiery facias* was regularly sued out upon the above mentioned judgment, and was directed and delivered to Pollitt, then being sheriff of Worcester County, who, in virtue of that writ, seized and took into his possession the goods and chattels mentioned in the declaration, and sold them at public sale. That the said goods and chattels were acquired and possessed by Parsons after his discharge, by his

62 own industry, and not \* by descent, gift, devise, bequest, or in a course of distribution. Upon this statement, the County Court, [POLK, Ch. J.] gave judgment for the plaintiff, and the defendant appealed to the General Court, where the cause was argued at September Term, 1804. The General Court affirmed the judgment of the County Court, and said that property acquired by an insolvent debtor, after he has been legally discharged under the insolvent law of 1774, ch. 28, otherwise than by "descent, gift, devise, bequest, or in a course of distribution," is not liable for, or subject to, debts contracted prior to his discharge; and if such property is liable, it cannot be affected by a *fiery facias*, without a *scire facias* having previously issued, if a year and a day have elapsed. The appellant appealed to this Court, and the cause was argued by

J. Bayly, for the appellant, and Wilson, for the appellee.

The Court of Appeals affirmed the judgment of affirmance.

## GREENE vs. MUSE et al. Lessee.

Where a conveyance had been acknowledged by husband and wife, of the wife's land, and the certificate by the Justices stated, that the wife "being first privately examined by us separate and part from her hus-

band, whether she did the same freely, voluntarily, and of her own accord, without being induced thereto by the ill-usage or threats of her husband, or fear of his displeasure, and having assured us she acknowledged the said deed freely and voluntarily, according to the Act of Assembly in such case lately made and provided, &c." was held not to pass the estate of the *feme covert* in the land to the grantee.

APPEAL from the General Court. The appellee, (the plaintiff in the Court below,) brought an action of ejectment for a tract of land called Widows' Purchase, lying in Dorchester County, containing 1,000 acres. A case was stated for the Court's opinion, which raised the question how far the acknowledgment, as made by a *feme covert* grantor to a deed of bargain and sale, was effectual to pass her interest in the land conveyed? It was a conveyance from Joseph Daffin, and Eleanor his wife, to Thomas Bourke, under whom the defendant in the Court below claimed, for part of the tract of land, for which the ejectment was brought.

The acknowledgment is as follows, to wit: "Maryland, Dorchester County, to wit: Be it remembered, that on the day and year above written, [1st of August, 1778, the date of the deed,] personally appeared before us, the subscribers, two of the justices of the peace for the County of Dorchester, the above named Joseph Daffin, and Elenor his wife \* and acknowledged the within deed, and all 63 and singular the within lands and tenements in the within deed contained, to be the right, title, interest and estate, of the within named Thomas Bourke, his heirs and assigns, for ever, agreeable to the true intent and meaning of the within deed; the same Elenor, wife of the same Joseph Daffin, being first privately examined by us separate and part from her husband, whether she did, the same freely, voluntarily, and of her own accord, without being induced thereto by the ill usage or threats of her said husband, or for fear of his displeasure, and having assured us she acknowledged the said deed freely and voluntarily, according to the Act of Assembly in such case lately made and provided," &c. Which was signed by the Justices. The General Court at April Term, 1805, gave judgment on the case stated for the plaintiff, and the defendant appealed to this Court, where the cause was argued by Bullitt and J. Bayly, for the appellant, and Martin and W. B. Martin, for the appellee. The Court of Appeals affirmed the judgment of the General Court.

#### PARTRIDGE'S Adm'x *vs.* PARTRIDGE'S Adm'x.

A devise of lands to a creditor does not extinguish a debt or claim which he has against the testator. (a)

(a) In *Owings vs. Owings*, 1 H. & G. 491, it is said to be well settled that a devise of land is not considered in law a satisfaction of a pecuniary debt.

APPEAL from Dorchester County Court. The appellant, (the administratrix of Jonathan Partridge,) brought an account of assumpsit against the appellee, (the administratrix of Isaac Partridge; and at the trial of the cause, established by testimony, that Isaac, in his life-time, was indebted to Jonathan, in his life-time, in a certain sum of money. The defendant then offered in evidence the will of the said Isaac, dated the 13th of December, 1801, whereby he devised to his father, Jonathan, (the plaintiff's intestate,) and his heirs, two tracts of land containing about 206 acres, and also the use of all his other lands for life. He also bequeathed to his said father, all his personal estate, and appointed him executor of his will. It was admitted, that the whole personal estate of Isaac was not more than sufficient to pay ten shillings in the pound, and that Jonathan had no benefit from the bequest of the personal estate

64 mentioned in the will; but that the same was expended \* by the payment of the debts of Isaac. That Jonathan accepted and held the lands devised to him by the will, under and in virtue thereof, which was of greater value than the debt claimed by the plaintiff. The defendant then prayed the Court to direct the jury, that the debt or sum of money claimed by the plaintiff, was extinguished by the said will, and ought not to be recovered. Which prayer the Court, [POLK, Ch. J. DONE and ROBINS, A. J.] granted, and were of opinion that the debt or sum of money claimed by the plaintiff was extinguished by the will, and ought not to be recovered, and did accordingly so direct the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court, where the cause was argued by

*J. Bayly*, for the appellant, and

*W. B. Martin*, for the appellee.

The Court of Appeals reversed the judgment of the County Court, and awarded a *procedendo*.

#### HAMPSON vs. EDELEN.

A contract for the purchase of land, *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time.

When the money is paid, the vendee is entitled to a conveyance. A judgment obtained by a third person against the vendor *mesne* the making

In *Addison vs. Bowie*, 2 Bland, 625, the Chancellor says: "In equity, when a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it may be presumed, in the absence of a contrary intention, that the legacy was meant as a satisfaction for the debt." But in *Spencer vs. Spencer*, 4 Md. Ch. 464, it is said that this rule has been much censured, and that very slight circumstances have been permitted to rescue particular cases from its operation.

the contract and payment of the money. cannot defeat the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*. (a)

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment. But the legal estate in the land is not vested in the judgment creditor, although he can convert it into money to satisfy his debt, by pursuing the proper means. (b)

APPEAL from the Court of Chancery. The bill of the complainant, (the now appellee,) stated, that in September, 1797, he purchased a part of a tract of land, lying in Prince George's County, called Stoney Harbour, containing 163 acres, from a certain Benoni H. Wade, at the price of £5 per acre; and on the 24th of Decem-

(a) Affirmed in *Hartsock vs. Russell*, 52 Md. 625, where it was held that the lien of a judgment fastens only upon the beneficial interest of the debtor in the land, and that, if the interest of the debtor be a legal estate, subject to an equity that can be enforced, the judgment will be a charge upon the estate, subject to that equity; and if the interest be an equitable estate only, the judgment will be a charge upon that interest and nothing more. The case in the text is also affirmed in *Dyson vs. Simmons*, 48 Md. 217, where the English cases are collected and examined in the opinion of the Court. In this case it was held that a judgment, being only a general lien, must be subordinated to the superior equity of a prior specific lien, created by a defective mortgage or conveyance. The judgment creditor stands in the place of his debtor, and can only take the property of his debtor, subject to the equitable charges to which it was justly liable in the hands of the debtor at the time of the rendition of the judgment. *Ibid.* Cf. *Knell vs. Building Assoc'n*, 84 Md. 67. *Hampson vs. Edelen*, is also affirmed in *Brewer vs. Herbert*, 30 Md. 310, where it was laid down that from the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the *interim* between the agreement and the conveyance. Cf. *Jenifer vs. Beard*, 4 H. & McH. 61, *note*. A trust valid and binding as against a party and his representatives, will be enforced in equity against his general creditors, whether the trust be expressly created by an unrecorded deed, or whether it arises from a valid contract in writing for a specific security. *Carson vs. Phelps*, 40 Md. 73. See the cases cited by Phelps, *arguendo*. *Ibid.*, 88. And so a subsequent incumbrancer chargeable with actual notice of a pre-existing imperfect mortgage will, in equity, be postponed to it. *Johnston vs. Cauley*, 29 Md. 211. Where a party purchases land with notice of a previous contract for the sale of the same land to a third party, he is subject to all the equities existing between the vendor and such third party. He is to be treated as a trustee of the first vendee, and will be decreed to convey in the same manner as the original vendor under whom he claims. *Smoot vs. Rea*, 19 Md. 398. As to the enforcement of an equitable lien against creditors, see *Alexander vs. Ghiselin*, 5 Gill, 188. Cf. *Magruder vs. Peter*, 11 G. & J. 218.

(b) Judgments create liens only because the land is made liable by statute to be seized and sold in execution, but such lien secures to the creditor neither *jus in re*, nor *jus ad rem*. *Dyson vs. Simmons*, 48 Md. 215, and cases there cited.

ber, 1797, Wade gave him full and absolute possession thereof, and that he has ever since continued in possession. That at the time of the purchase of the land, Wade was indebted to the complainant on bond, with Thomas Mundell his surety, in the quantity of 15,605 lbs. of net tobacco, to be paid at the price of 65 shillings per hundred, the whole amounting to £482 current money, and it was then agreed, that the bond should be received in part payment of the land at the said amount, and the same was accordingly given up to Wade. That the complainant continued in possession of the land, and used and cultivated it, and having paid up the whole purchase money, on the 12th of November, 1798, obtained a conveyance for the same.

**65** That after he had purchased \* the land from Wade, and had paid the amount of the bond in manner aforesaid, and had been in possession, and had used the land from the month of December, 1797; to May, 1798, a certain Bryan Hampson obtained three judgments against Wade at May Term, 1798, in the General Court, on which judgments several writs of *fiery facias* have issued returnable to the next General Court at May Term, 1800, and have been laid on the land of the complainant so as aforesaid bought and paid for, and there will be an immediate sale thereof, unless prevented by this Court. That at the time the complainant purchased and paid for the land as aforesaid, he never heard of the judgments against Wade, and was wholly ignorant of the same, until the writs of *fiery facias* were about to be laid on the land. That he is advised that, having bought the land, and having been in possession thereof as aforesaid, and having paid to the amount aforesaid, before any judgment was obtained against Wade, he is entitled to the aid of this Court to secure him in his title to the land. Prayer for an injunction to enjoin proceedings on the judgments and executions, and for other relief, &c. An injunction accordingly issued.

On coming in of the defendant's answer, and testimony taken under a commission, the case was submitted.

HANSON, C. (October Term, 1803.) Whether or not the defendant would have had any ground of relief in case he had filed a bill against Edelen and Wade, the Chancellor neither will, nor ought to, nor can positively determine. Perhaps the whole of the circumstances of the case may not be before the Court. However, as the Chancellor cannot doubt that the complainant, at the time when the judgments in the bill mentioned against Wade, had a clear equitable interest in the land mentioned, which has since been conveyed to him, he conceives that it is the duty of this Court to protect the said interest—Decreed, that the injunction, in this case issued, be perpetual, and that each party pay his own costs. From which decree the defendant appealed to this Court.

The cause was argued in this Court before CHASE, Ch. J. TILGHMAN, and NICHOLSON, JJ.



\* *T. Buchanan*, for the appellant. The question is, whether or not a man purchasing land under a parol agreement shall be protected against a judgment creditor, under a judgment rendered against the vendor subsequent to the sale and prior to any conveyance being made for the land? He referred to *Sorrel vs. Carpenter*, 2 P. Wms. 482; 2 Fonbl. 157; *Worsley vs. The Earl of Scarborough*, 3 Atk. 392; *Churchil vs. Grove*, 1 Chan. Ca. 35; *Bovey vs. Skipwith*, *Ibid*, 201; *Peach vs. Winchelsea*, 10 Mod. 468; *Finch vs. Winchelsea*, 1 P. Wms. 277; 2 Pow. on Cont. 58, 34; *Brandlyn vs. Ord*, 1 Atk. 571; *Marlow vs. Smith*, 2 P. Wms. 199; *Tourville vs. Naish*, 3 P. Wms. 307; *Wigg vs. Wigg*, 1 Atk. 384.

*Shaaff*, for the appellee.

CHASE, Ch. J. delivered the opinion of the Court. In this case it appears that a considerable part of the purchase money was paid, and possession given of the land, prior to the obtention of the judgments by Hampson against Wade.

A contract for land, *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in Chancery for a specific execution of the contract, if such conveyance is refused.

A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means.

*Decree affirmed.*

\* GOVER vs. CHRISTIE and JAY.

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Where A. in consideration of a debt due from him to B. assigns to him (not under the Act of 1763, ch. 23, s. 9, 10,) the bond of C. and C. is or becomes insolvent—On a bill by B. against A. to compel payment of the bond so assigned—Decreed, that the Court of Chancery has no jurisdiction; that if the assignment was an extinguishment of the original debt, the complainant was not entitled to relief either at law or in equity; and if the assignment was not an extinguishment of the original debt, the complainant had his remedy at law on the original contract, there being no circumstances disclosed in the bill to make it necessary for him to resort to a Court of equity.

APPEAL from the Court of Chancery. The bill of the complainants, Christie and Jay, stated, that on the 20th of February, 1797,

Samuel Willetts, for full value received, executed a single bill to Gover, the defendant, promising to pay to him, or order, £233, on or before the 1st of April, 1798. That in consideration of a debt due from Gover to them, he on the 11th of May, 1797, assigned the said single bill to the complainants. That suit was brought on the bill against Willetts, in the name of Gover, for the use of the complainants. That a judgment was obtained at May Term, 1800, and an execution issued against the property of Willetts, which was returned *nulla bona* to October Term following. That no part of the debt was ever paid, except £10 paid on the 30th of September, 1797. That Willetts has become insolvent, and released by the insolvent law. That the complainants have frequently called on Gover, the assignor, and requested payment, which he has refused. That the assignment of the single bill was not made in pursuance of the Act of Assembly, so as to enable the complainants to proceed at law against Gover, the assignor. Prayer, for a decree to compel Gover to pay the amount of the single bill, (deducting the said payment,) with interest, &c. and for other relief, &c. The answer of Gover stated, that he assigned the single bill of Willetts, and two other bonds to him from other persons, to the complainants, in full satisfaction of the debt which he owed to them, and that they agreed to take said assignments in full satisfaction, without having any further or after recourse to him for the debt due from him to them, or for or on account of the assigned bill and bonds, and upon that condition the assignments were made, and receipt in full was given for the debt due by him to them. That when the assignments were made, the several obligors were in solvent circumstances, and good credit; and that the amounts due on the two bonds have been received by the complainants, and they might have received the amount due on the single bill from Willetts, if due and reasonable diligence had been used. The complainants entered a general replication to the answer of the defendant, and a commission issued to take testimony. By the testimony it was proved, that Willetts was not solvent and in circumstances \* to pay his debts to any amount in either of the years 1797, 1798, 1799 or 1800. The case being submitted, the following decree was made by

68 HANSON, C. (December Term, 1803.) The cause being ready for decision, the bill, answer and exhibits, evidence, and all other proceedings, were by the Chancellor carefully read and considered, and it appearing just and equitable that the complainants should not be excluded from recovering the balance of the debt due from the defendant to them, on account of having received the assignment of a bond from one Samuel Willetts to the complainants, inasmuch as the money never was received, and especially, as appears from the evidence in the cause, that he was insolvent at the time the defendant assigned the same to the complainant—Decreed, that the defend-

ant pay to the complainants the sum of £216 7 9, current money, stated by the auditor of the Court, under the Chancellor's order, to be due, with interest thereon until paid, together with costs of suit. From which decree the defendant appealed to this Court.

The cause was argued before CHASE, Ch. J., TILGHMAN, NICHOLSON and GANTT, JJ.

*Shaff* and *Harper*, for the appellant, contended, that the complainants had adequate remedy at law, and could not apply to a Court of equity for relief. *Cole vs. Garretson*, 1 H. & J. 370; *Forbes vs. Perrie*, *Ibid*, 109; *Winchester et al. vs. Brooke*, *ante* 1.

*Johnson*, (Attorney-General,) for the appellees, cited *Fonbl.* 10, 14. The Act of 1763, ch. 23, s. 9, 10; *Pasley vs. Freeman*, 3 T. R. 51.

CHASE, Ch. J. delivered the opinion of the Court. The Court are of opinion, that the Court of Chancery had no jurisdiction in this case.

If the assignment was an extinguishment of the original debt, the complainants are not entitled to relief, either at law or in equity.

If the assignment was not an extinguishment of the original debt, and the Court are of that opinion on consideration of the bill, answer and proof, the complainants had \* their remedy at law on the original contract, there being no circumstances disclosed in 69  
the bill to make it necessary for them to resort to a Court of equity.

*Decree reversed.*

#### LAILLER vs. YOUNG'S Lessee.

A. by his will, devised as follows: "I give and devise to my son R. a tract of land, &c. to him and his heirs, forever, and in case he dies without heirs, to my son J. and the heirs of his body lawfully begotten." This devise created an estate tail in R. the devisee.

Under the Act of November, 1782, ch. 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate. A common deed of bargain and sale operates to convey the estate and vest a fee simple in the grantee.

If a limited interest is conveyed by A tenant in tail, upon the expiration of the particular interest, the tenant in tail again takes the estate tail as originally held.

A lease for seven years, made by tenant in tail, will have the effect to pass the estate for the term therein expressed.

A mortgage made by a tenant in tail defeats the estate tail for a limited time.

If the money is paid, the old estate is revived.

An estate tail cannot be devised under the Act of 1782, ch. 23. (a)

(a) See *Smith vs. Smith*, *post*, m. p. 814.

The intention and meaning of the Legislature are to be collected from the law itself, and they are not to be restrained by anything in the preamble. (a)

**APPEAL** from the General Court. The appellee brought an action of ejectment in that Court to recover a tract of land called Lee's Purchase, otherwise called Laidler's Ferry, lying in Charles County. The defendant, (now appellant,) took general defence. At the trial at May Term, 1804, the plaintiff offered in evidence a grant for Lee's Purchase, dated the 2d of May, 1664, to John Lee; also the will of Richard Lee, the heir of John, dated the 3d of March, 1714, devising the land to his son Philip Lee; also the will of Philip Lee, dated the 20th of March, 1743, devising the land to George Lee; also a deed from George Lee to John Laidler, dated the 10th of October, 1760, and the will of John Laidler dated the 1st of February, 1771, devising as follows, viz. "I give and devise to my son Robert Laidler, all that tract of land called Lee's Purchase, to him and his heirs for ever, together with the lands thereto adjoining; and in case he dies without heirs, to my son John Laidler, and the heirs of his body lawfully begotten." He also offered in evidence and proved, that after the death of John Laidler, the testator, Robert, his son and devisee, entered and was seized of the lands devised to him by the will; and that Robert, in his life-time, executed the following lease to the lessor of the plaintiff, viz. "Know all men by these presents, that I, Robert Laidler, of Charles County, in the State of Maryland, for and in consideration of the annual sum of five pounds currency, paying my just debts, and maintaining my sister Elizabeth Laidler, have farmed and to rent let unto Joseph Young, the plantation whereon I now live, known by the name of Laidler's Ferry, for the term of seven years from the date hereof.

**70** As witness my \* hand and seal this eighth day of June seventeen hundred and ninety-nine.

Witness,

ROBERT LAIDLER (SEAL.)

ADAM RAINS, STEPHEN MOORE, JOHN SLIMER.

That Robert Laidler died after the execution of the lease, intestate, and without issue, leaving the defendant his heir at law. The defendant then prayed the opinion of the Court, and their direction to the jury, that under the lease so executed, the plaintiff was not entitled to recover.

*Key, Mason, and J. B. Duckett*, for the defendant, contended, that the lease executed for seven years, by Robert Laidler the tenant in tail, did not operate under the Act of November, 1782, ch. 23, to bar the estate tail created by the will of John Laidler, and that upon the death of Robert Laidler, the land descended to the defendant. They cited and relied on the statutes, *De Donis*, 32 Hen. VIII, ch. 28; 13 Edw. I, ch. 1; 4 *Bac. Ab. tit. Leases*, (D.) 22.

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(a) See *Canal Co. vs. R. R. Co.* 4 G. & J. 1.

*Martin*, (Attorney-General,) *Johnson* and *T. Buchanan*, for the plaintiff, referred to the same statutes; also 2 *Blk. Com.* 119. The Acts of June, 1773, ch. 1; Nov. 1782, ch. 23; and 1786, ch. 45; *Todd et al. vs. Pratt*, 1 *H. & J.* 465; *Paca's Lessee vs. Forwood et al.* 2 *H. & McH.* 175.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court are of opinion, that under the Act of Assembly of November, 1782, ch. 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate; the remainder, whatever it may be, will, in this last case, descend. But if he intends to change the estate tail to a fee simple, then a conveyance and reconveyance to himself are necessary. But if he disposes of the estate, a common deed of bargain and sale will operate to convey the estate, and vest a fee simple in the grantee.

If a limited interest is conveyed, upon the expiration of the particular interest, the tenant in tail again takes the estate tail as originally held.

\* The Court have no doubt but that a lease will have the effect to pass the estate, for the term of years therein expressed; for if a tenant in fee simple can lease, a tenant in tail may also. 71

It was contended, in the case of *Paca's Lessee vs. Forwood et al.* that an estate tail might, under the Act of 1782, be devised by last will and testament. But the Court said it could not; for they considered the tenant in tail, and the heir, in the situation of joint tenants, and that the estate, upon the death of the tenant in tail, survived to the heir, and as the will would not take effect until after the death of the tenant in tail, the right of the heir, by such death, had already vested.

It has been said, that a mortgage executed by the tenant in tail conveyed the interest. It is not so. When the money is paid, the old estate is again revived, and the mortgage only defeats the estate tail for a limited time.

The intention and meaning of the Legislature are to be collected from the law itself, and they are not to be restrained by any thing in the preamble.

Upon the whole, the Court are of opinion, that the lease in this case is good and valid in law to pass and transfer the interest in the land to the lessee for the term of years therein mentioned, and when the term of years expires, the remainder-man will take the estate under the will.

The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this Court.

The case was argued before TILGHMAN, NICHOLSON, and GANTT, JJ. by

Key, for the appellant, and by

Johnson, (Attorney-General,) and T. Buchanan, for the appellee.

The Court of Appeals affirmed the judgment of the General Court.

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## \* M'ELDERRY vs. SMITH'S Lessee.

If the defendant during the pendency of a *scire facias*, on a judgment against him, aliens his lands, the plaintiff, after a *stat* on the *scire facias* may issue a *fleri facias*, and levy it on the lands so aliened, without proceeding against the alienees. (a)

A *scire facias* against terre-tenants is either general, without naming them, or special against them by name.

Whether or not the return made on a *fleri facias* by a sheriff, stating that he had laid it "on 4 acres of land near Baltimore-town, and adjoining the lands of G. L. also on about 27 acres of land, more or less, part of C. H. or T. R. and part of M. N. lying to the N. side of Pitt Street, near Baltimore-town," &c. and the sheriff's return on a *venditioni exponas*, issued for a sale of the lands, that he had "made and satisfied plaintiff in part," together with parol evidence of the sale of the lands by the sheriff, and his deed therefor to the purchaser, are sufficient to vest the legal title to the lands in the purchaser? *Quere*.

APPEAL from the General Court. This was an action of ejectment brought to recover two tracts of land, viz. Cole's Harbor, and Mountenay's Neck, lying in Baltimore County. The defendant, (now appellant,) pleaded the general issue. The plaintiff at the trial, at May Term, 1804, offered in evidence, that Andrew Stigar, in his life-time, being seized of four parts or parcels of the two tracts of land for which the ejectment was brought, and being justly indebted to James Franklin, in order to secure to him payment of the money due, did, on the 9th of May, 1787, execute a mortgage to him of the said parcels of land, to be void upon payment of the money due, on the 7th of May, 1789. He also gave in evidence, that no part of the money has been paid; and that the lessor of the plaintiff is heir at law, and administratrix of Franklin, who died before the institution of this suit. The defendant then offered in evidence, that Stigar, was seized and possessed of the said four parcels of land before and on the 24th of May, 1785. He then offered in evidence a record of a judgment obtained by Thomas Usher against Stigar, in the General Court in May, 1785, which judgment was signed on the 25th of that month. And evidence that Usher afterwards departed this life on the 1st of January, 1786, having by his will appointed T. Usher, J. Donaldson, and S. Johnson, his executors. He also offered

(a) Affirmed in *Warfield vs. Breuer*, 4 Gill, 268. See *Nesbitt vs. Manro*, 11 G. & J. 261; *Murphy vs. Cord*, 12 G. J. 182; *Brauner vs. Watkins*, 28 Md. 217; *Evans' Prac.* 68, 470; 2 *Poe's Pldg.* sec. 593. The case in the text is cited in *Taylor vs. Thomson*, 5 Peters, 369.

in evidence certain records and proceedings of the General Court, showing that the said executors afterwards, on the 5th of April, 1786, sued out a writ of *scire facias* on the said judgment, the same being then due and unsatisfied; and that a *fiat* was thereon entered at October Term, 1787. That a writ of *feri facias* issued on the last mentioned judgment, directed to the then sheriff of Baltimore County, on the 17th of July, 1788, returnable to the October Term following, when it was returned by the said sheriff, thereon endorsed, "made as per schedule, and remains in the sheriff's hands, for want of buyers." Which said schedule stated, that "four acres of land near Baltimore Town, and adjoining the property or lands of George Lux, with all the improvements thereon," were valued by four persons, as appraisers, to £1,500, and "about 27 acres of land, more or less, part of Cole's Harbor or Todd's \* Range, and part of Mounteney's Neck, lying to the north side of Pitt Street, near Baltimore-town," were valued at £12 per acre; and "about 2½ acres of land in the S. East addition of Baltimore-town, lying on Harford and Eden Streets," were valued at £12 per acre; and "Part of Todd's Range, containing 11 acres, more or less, leased to Peter Shepperd for £90 per. annum," was valued at £1,500. That a writ of *venditioni exponas* issued to the said sheriff on the 6th of December, 1788, commanding him to expose to sale the several parcels of land, and the money therefrom arising, have before the Court at the May Term then following; which last mentioned writ the said sheriff returned, thereon endorsed, "made and satisfied plaintiff in part, £485." He then offered in evidence, that T. Usher purchased the lands exposed to sale upon the said writ of *venditioni exponas*, from the said sheriff, under the said execution; and that the said sheriff executed to him a deed therefor, which deed the defendant also offered in evidence, dated the 31st of December, 1790. He also offered in evidence, that T. Usher did duly pay to the said sheriff the purchase money for the land so to him sold; that he entered upon the said land, and was thereof seized; and afterwards, on the 11th of May, 1792, for a valuable consideration to him paid by the defendant, did duly execute and deliver to him a deed of bargain and sale for the said parts of the two tracts of land before described. Also, that under that deed the defendant entered, &c. and that Franklyn, or any person claiming under him, never was in the actual possession of the said lands, but that the same remained in the actual possession of Stigar, or those under whom the defendant claims. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that on the foregoing statement of facts, if they believe it to be true, the plaintiff is entitled to recover all the lands for which this suit is brought.

*Martin*, (Attorney-General,) and *Harper*, for the plaintiff, cited *Arnott & Copper vs. Nicholls*, 1 H. & J. 471, and *Cō. Litt.* 1.

*Key, Purviance and S. Chase, Jr. for the defendant, cited 1 Blk. Com. 91, 328; Cunningham's \* L. D. tit. Terre-tenant; Jacob's*  
**74** *L. D. tit. Terre-tenant; Vin. Ab. 563, 567; 3 Bac. Ab. tit. Execution, 363; Com. Dig. tit. Execution, (D. 1;) 2 Blk. Com. 91.*

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) In the case of *Arnott & Copper vs. Nicholls*, the Court considered they might on motion decide whether or not Goldsborough was a *bona fide* purchaser, and it turned out that he was a fair purchaser. The *feri facias* in that case had been taken out after the alienation of the land, and the Court thought the alienee should have notice; and that a *scire facias* should have issued to warn him as terre-tenant; that the whole real estate of the defendant was bound by the judgment, and if there were other alienees, or other real estate, the whole should contribute. That the alienee, having notice, might come in and pay the judgment so as to exonerate the land; and if there was other property than that aliened, the *feri facias* should be levied of that, before recourse should be had to the land aliened.

The Court consider the case of *Arnott & Copper vs. Nicholls*, similar to the case at bar in all respects except as to the mortgage.

The mortgagee has a legal title in the land mortgaged, and upon failure to comply with the proviso, by paying money, the legal title is completely vested in the mortgagee, to be defeated only upon payment of the mortgage money; or in other words, the mortgagee has a legal title in the land, defeasible at law, by redemption at the day, indefeasible at law afterwards.

The mortgagee can bring his ejectment, but the mortgagor may come in and pay the money, and exonerate the land.

At the time the judgment was rendered on the *scire facias*, the mortgagee was terre-tenant of the land, and the *scire facias* ought to have issued against him to give him an opportunity to plead as terre-tenant.

A *scire facias* against terre-tenants is either general or special, that is, either against the terre-tenants generally, without naming them, or specially against them by name. In the former it may be shown

**75** there are others, and in the \* latter it is a good plea in abatement, that there are others not named.

In this case, instead of issuing the *feri facias* the party should have taken out a *scire facias* against the mortgagee, the terre-tenant.

The Court therefore give the direction to the jury as prayed by the plaintiff.

The defendant excepted. and the verdict and judgment being for the plaintiff, the defendant appealed to this Court.

The cause was argued before TILGHMAN, NICHOLSON, and GANTT, JJ.



*Key and Shaaff*, for the appellant, stated, that the question for the decision of the Court was, whether or not a writ of *scire facias* ought to have issued against the terre-tenants claiming under the mortgage, where there was an alienation of the land pending the *scire facias* on the judgment? They contended, that a writ of *scire facias* was not necessary, and referred to 2 *Bac. Ab. tit. Execution*, (I,) 731; 4 *Com. Dig. tit. Execution*, (D 1,) 133; 10 *Vin. Ab. tit. Execution*, 563; *Co. Litt.* 290 b.

*Harper*, for the appellee, cited 6 *Bac. Ab. tit. Scire Facias*, (C 5,) 114; *Tully's Case*, 2 *Salk.* 598; 5 *Com. Dig. tit. Pleader*, (3 L. 14), 783; *Adams and Terre-tenants of Savage*, 2 *Salk.* 601; *The Earl of Pembroke's Case*, *Carth.* 111; *Arnott & Copper vs. Nicholls*, 1 *H. & J.* 471.

He also objected that the sheriff's returns on the *fieri facias* and *renditioni exponas*, and the sheriff's deed, with the evidence offered, were not sufficient to vest the legal title to the lands in the purchaser; but this objection was afterwards withdrawn, because it had not been made in the Court below.

The Court of Appeals reversed the judgment of the General Court.

\* WINGATE vs. DAIL.

76

A parol contract between a father-in-law, and son-in-law, that the father-in-law would give a real estate to his grand-son, in consideration of the son-in-law paying one-half of the value of the land—Not enforced, though possession was held by the son-in-law, and a part of the purchase money paid. (a)

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint. By the bill, answer, and testimony taken in the cause, it appears that a certain William Dail, having a daughter married to Wingate, the complainant, entered into a verbal agreement with him to sell to him two parcels of land, on which Wingate then resided, for £150, being one-half the value of the land; the other half he intended to give to Wingate's wife; and that Dail often declared that the land was to be deeded to Wingate's son. That Wingate paid £40 in part of the purchase money, and continued in possession, and paid the taxes on the land, which were charged to him by the direction of Dail, and with the approbation of Wingate. That Dail made an entry in his book of accounts, crediting Wingate on the 25th of August, 1798, "By cash received

(a) Approved in *Mundorff vs. Kilbourn*, 4 Md. 462; *Stoddert vs. Bowie*, 5 Md. 33; *Billingslea vs. Ward*, 33 Md. 52; *Small vs. Owings*, 1 Md. Ch. 370, as to the Acts of part performance which will suffice to take a case out of the Statute of Frauds. See also *Simmons vs. Hill*, 4 H. & McH. 165; *Waters vs. Howard*, 8 Gill, 262; *Semmes vs. Worthington*, 38 Md. 298.

for a contract for the plantation where he now lives," &c. £40. That Dail afterwards had a son born, named Joseph, (the appellee,) and in order to make provision for his son, declared his intention of taking the land from Wingate, and giving it to his son, and in lieu thereof to give Wingate personal property; which intention was made known to Wingate, who was not altogether satisfied with the arrangement. That Dail offered to return the £40 to Wingate, which the latter did not refuse to take, but said he had no occasion for it, and Dail said he would keep it for him until he should call for it. Dail afterwards, by his will, devised the land to his son, (the appellee,) and bequeathed sundry slaves to Wingate's wife.

HANSON, C. (2d July, 1804.) It appears, that to prevent the setting up of contracts, like the one stated in the bill, was the object of the Statute of Frauds and Perjuries; and this Court never did, and never ought, by its decision, to defeat the salutary intent of the Act.

It has, indeed, under some circumstances, enforced the performance of parol contracts, but never in a case like the present, where it remains uncertain whether or not there was any contract, and even if there was a contract, it does not appear clearly what was the engagement on the complainant. Decreed, that the bill be dismissed, but without costs.

From which decree the complainant appealed to this Court.

**77** \* The cause was argued before CHASE, Ch. J. TILGHMAN, NICHOLSON, and GANTT, JJ.

*J. Bayly*, for the appellant, to shew that such a contract ought to be enforced, cited 1 *Eq. Ab.* 21; 1 *Vern.* 363; 2 *Vern.* 455, 2d pt.; 1 *Eq. Ab.* 32, 42, 44; 1 *Atk.* 12, 15; 1 *Ves.* 83, 221, 297, 441; 2 *Ves.* 299; 3 *Atk.* 4.

*Shaff*, *contra*, contended, that Chancery would not enforce a contract which the party who applied to have it enforced had shown an unwillingness to comply with on his part. That a contract, if in writing, would not be enforced if there was proof that it had been rescinded by parol. 1 *Fonbl.* 392, (*note e.*)

The Court of Appeals affirmed the decree of the Court of Chancery.

#### CLARKE *vs.* MAGRUDER, *et al.*

Unless the contrary is proved, it is presumptive evidence that a clerk, who is dead, and who made certain entries on the books of his employer, delivered the goods, as charged. (*a*)

(*a*) The rule is well settled that entries made by a clerk in the regular course of business, he having no interest at the time in stating an untruth

The defendant may set-off, against the plaintiff's demand, a note of the plaintiff's accrued subsequent to the commencement of the action. (a)

**APPEAL** from the General Court. This was an action of *assumpsit*, brought by the appellee, (the plaintiffs in the Court below,) for goods sold and delivered, &c. The writ issued on the 9th of March, 1799, and at May Term, 1802, the action was entered for the use of Samuel Johnson, and others. The defendant, at October Term, 1799, pleaded *non-assumpsit*, and issue was then joined. He afterwards, at October Term, 1801, filed an account in bar, and gave notice of a set-off.

1. The plaintiff, at the trial at October Term, 1804, produced the original partnership day-books in Court, and a witness to prove the hand-writing of the clerk who made the entries in the books, the clerk being dead. This was resisted by the defendant's counsel.

**CHASE, Ch. J.** The Court have no doubt upon the subject. It is to be presumed, the entries being made in the hand-writing of the clerk, that he delivered the goods as charged. The defendant may prove the contrary, and if he does not, it is presumption, on the part of the plaintiffs, that the clerk who made the entries on the books delivered the goods.

2. The plaintiffs then read in evidence the original writ which issued in this case on the 9th of March, 1799, (there being no endorsement at that time for the use of Samuel Johnson, and others,) and that it was served on the 19th \* of April, 1799, with a copy of the declaration and account; and gave in evidence, 78 that at October Term, 1799, the plea of *non-assumpsit* was put in, and issue joined in the cause. They further gave in evidence, that the defendant was indebted to them on the 13th of August, 1798, for goods, wares and merchandises, to him sold and delivered before that time, in the sum of £381 10 3 $\frac{1}{2}$  current money. The defendant then offered evidence to prove, that on the 24th of August, 1798,

are admissible in evidence after the clerk's death. *Romer vs. Jaecksh*, 39 Md. 589; *Reynolds vs. Manning*, 15 Md. 510; *King vs. Maddux*, 7 H. & J. 467. But entries made in the course of business by a deceased partner are not admissible in evidence in a suit by the surviving partner against a debtor of the firm. And this rule is not altered by the Act of 1864, c. 109. *Romer vs. Jaecksh*, *supra*.

(a) In *Foley vs. Mason*, 6 Md. 51, the Court said that, since the case of *Clarke vs. Magruder*, it has been regarded as the settled law of this State that a note drawn by the creditor may be set off, or pleaded in discount by his debtor, although the latter may have obtained possession of the note, at a discount, and with a view to the set-off, after he became indebted to his creditor. See *Annan vs. Houck*, 4 Gill, 330. But in attachments, the right of set-off as against the attaching creditor does not extend to any matter originating by the action of the garnishee subsequent to the garnishment. *Bank vs. Bank*, 31 Md. 404.

he paid the plaintiffs the sum of £98 12 6 current money, part of the debt due to them; and that, by his counsel, he gave notice of a set-off at October Term, 1801, of the following note, with the endorsement thereon:

“Baltimore, October 29, 1799.

For Dollars 1,270 92. Six months after date we promise to pay to Mr. P. D. Goverts, or order, one thousand two hundred seventy dollars and ninety-two cents, for value received.

WM. B. MAGRUDER & Co.”

Which note was thus endorsed: “I hereby assign and make over all my right, title, claim and interest, of the within note, to Bailey E. Clark, for value received, he clearing me of my indorsement and all possible consequences. PETER D. GOVERTS.”

And the defendant proved the signature to the note, “Wm. B. Magruder & Co.” to be the signature and proper hand-writing of the plaintiffs, and the hand-writing and signature of Peter D. Goverts, to whom the note was made payable. He also gave in evidence, that the entry on the docket of the plaintiff’s cause of action for the use of Samuel Johnson, and others, was made at May Term, 1802, and not before. The plaintiffs then produced and read in evidence, by and with the consent of the defendant and his counsel, the certificate of Peter D. Goverts, to prove that the defendant, on the 16th of May, 1800, and not before, purchased the note from him for the sum of \$225. “Baltimore, September 12, 1803. I, the subscriber, hereby certify to have sold to Mr. Baley E. Clarke, on the 16th of May, 1800, Messrs. Wm. B. Magruder & Co’s note of hand, drawn in my favor, and amounting to dollars 1,270 92 cents, dated October the 29th, 1799, six months after date, for the sum of \$225, in consideration of he the said Clarke not holding me responsible for my indorsement. PETER D. GOVERTS.”

\* The plaintiffs then prayed the opinion of the Court, and  
**79** their direction to the jury, that the defendant could not avail himself in law of the note so made and endorsed to him as a set-off in bar to the residue of their claim.

*Key*, and *T. Buchanan*, for the plaintiffs, cited *Evans vs. Brosser*, 3 *T. R.* 186; Act of Assembly, 1785, ch. 46; 1 *Esp.* 239; *Bull. N. P.* 180; Statutes, 2 *Geo. II.* ch. 22, s. 13, and 8 *Geo. II.* ch. 24, s. 4, 5; 3 *Went. Plead.* 159 to 172; *Imp. C. B.* 204, 254, 294; *Morg. Vad.* 350; *Marsh et al. vs. Chambers*, 2 *Stra.* 1234.

*Mason*, for the defendant, cited *Gassaway vs. Dorsey*, 4 *H. & McH.* 405; *Wolgamot vs. Bruner*, 4 *H. & McH.* 89; *Baskerville vs. Brown*, 2 *Burr.* 1229; 1 *Esp.* 240; the Act of Assem. 1785, ch. 46, s. 7; *Barnes’ Notes*, 450; *Bull. N. P.* 181; *Collins vs. Collins*, 2 *Burr.* 820.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court are of opinion, that the defendant is not entitled to the set-off

claimed, as his right to the plaintiffs' note accrued subsequent to the commencement of this action. If this set-off was allowed, great mischief would result from it. It would burthen the plaintiff with the costs of suit, although at the time he instituted his suit he had a good cause of action, and against which, at the time, there was no defence, and it would encourage and sanction a practice which ought not to receive any countenance or favor from this Court—the practice of buying up claims against a plaintiff, which, instead of promoting, would be a perversion of justice.

The Act of Assembly, in the opinion of the Court, makes no change in the law as to the time the cause of action accrues. It enumerates the cases in which the set-off may be claimed, and allows the defendant to plead it, or give it in evidence on the general issue, on filing his cause of action, and giving notice that he claims to set it off against the plaintiff's suit.

Certainly the Act of Assembly ought to be liberally construed so as to prevent circuity of action and to do justice between the parties in the adjustment of their mutual debts, subsisting at the time the action was brought; but there would be no liberality or justice in construing it so \*as to sanction and legalize the practice of buying up claims to harass the plaintiff, and bur- 80 then him with costs, without any fault in him.

The Chief Judge observed, that the defendant can avail himself of nothing done during the pendency of the action, unless it has the concurrent act of the plaintiff. The debt must be a subsisting debt at the time the suit is brought. If the defendant pays the debt, or has a release, he must plead it after the last continuance. If a *feme sole* marries pending the suit, it must be pleaded *puis darrein continuance*.

In the case of *Wolgamot vs. Bruner*, there were three pleas, viz. Nothing in arrear, payment, and set-off. There was a demurrer to the last plea, and an exception to the other pleas. The exception was defective; and the only question was upon the plea of set-off, as the party could not take advantage of the exception, it being defective, *Barnes' Notes* was the only case referred to on the set-off. The case of *Sapsford vs. Fletcher*, 4 T. R. 511, is certainly good law; it was there considered, that payment to the landlord by the subtenant, is payment to the tenant. All the authorities, both before and since the Revolution, concur in establishing that a plea of set-off is not a good plea to an avow in replevin. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this Court.

The cause was argued before TILGHMAN, NICHOLSON, and GANTT, J.J.

*Shaaff, Johnson*, (Attorney-General,) and *Van Horn*, for the appellant, referred to the statutes of 2 Geo. II, ch. 22, s. 11; 8 Geo. II,

ch. 24, s. 4, 5; and the Act of 1785, ch. 46, s. 7; *Collins vs. Collins*, 2 Burr. 824; Stat. 8 & 9 Wm. III, ch. 11; *Evans vs. Prosser*, 3 T. R. 186.

*Key* and *T. Buchanan*, for the appellees, cited *Baskville vs. Brown*, 2 W. Blk. Rep. 293; 2 Burr. 1229; S. C. 3 Morg. V. M. 191, 350; 2 Harr. Ent. 468; 3 Went. 160, &c.; 1 Esp. 238, 239; *Le Bret vs. Papillon*, 4 East, 507; *Stone vs. Rafter*, 1 H. & J. 365; *Reynolds vs. Beerling*, 3 T. R. 188.

The Court of Appeals reversed the judgment of the General Court.

## 81

## \* SAUNDERS et ux. vs. SIMPSON et ux.

A specific performance of a bond for the conveying of lands, executed in 1777 by a father, in favor of his daughter, decreed, on a bill filed in 1797, although strongly contested on the ground that the bond was never executed, or if executed, that it was obtained by fraud.

An equitable title in the defendant to lands, will not prevent a recovery against him in an action of ejectment brought by a person having the legal title, (*note.*) (a)

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint. The bill filed by the present appellants, on the 15th of November, 1797, was for a specific performance of the following agreement, executed on the 28th of December, 1777, by William Andrew, deceased, viz. "Baltimore County, to wit: This agreement witnesseth, that whereas I, William Andrew, of the said county, did engage and promise to give unto my daughter, Elizabeth Saunders, on or before her marriage with Mr. Robert Saunders, eight or nine hundred acres of land; and three or four negroes, which land hath since been recovered of me, so that I cannot give her that land I promised; and I, the said William Andrew, have now settled the said Robert, and Elizabeth his wife, on my Bush River plantation, called Jones' Inheritance, containing three hundred and ninety-six acres, more or less, and also a tract called Smith's Discovery thereto adjoining, containing seventy-seven acres, more or less, and do hereby now assign William Robinson's bond for the conveying of said last mentioned tract, unto my said daughter Elizabeth, her heirs and assigns, and all the estate I can or may claim thereon and thereby, which lands I mean to give her in lieu of the lands so promised to her as aforesaid, which the said Robert and Elizabeth do now agree to take. And the said Robert hath lent and advanced me at several times divers sums of money—Now I, the said William Andrew, as well to perform my said promise as aforesaid made, as for the money advanced as aforesaid, and for divers other good causes moving me towards my said daughter Elizabeth, do now agree and promise

(a) See *Matthews vs. Ward*, 10 G. & J. 448.

never to remove my said daughter, nor her husband, from the said lands, but they, and each of them, shall and may have and hold the said lands under this agreement, from the date hereof; and I do promise for me, and my heirs, to give, convey, and perfect her title and right to the said lands, I mean to my said daughter, her heirs and assigns, either by my last will, or by deed duly executed, at the end of a lease which I heretofore gave them, so that my said daughter may peaceably possess and enjoy said lands, and her heirs, for ever. In witness \*whereof I have hereto set my hand and seal this 28th day of December, 1777. 82

WM. ANDREW. [L. S.]

Sealed and delivered in presence of

*Abraham Andrew, Averilla Andrew, Priscilla Colvin."*

The bill stated, that Abraham Andrew, one of the subscribing witnesses to the agreement, was the eldest son and heir at law of William Andrew, and that Averilla Andrew and Priscilla Colvin, were two of his daughters. That William Andrew died on or about the 1st of February, 1783, having first duly made and executed his last will and testament, by which, after devising a few inconsiderable legacies to his children by his first wife, (one of whom was Elizabeth, one of the complainants,) he devised all the rest and residue of his estate to the daughter by his second wife, by the name of Elizabeth Durban William Andrew, which second wife had been the house-keeper for William Andrew, and by him kept after he separated from, and during the life of his first wife, and whom he intermarried with after the death of his first wife, having had issue one daughter, Elizabeth Durbin William Andrew, who hath since intermarried with John Simpson. That Simpson, and wife, claiming the premises by virtue of the will, brought an ejectment in the General Court against the complainant, Saunders, and recovered judgment for the possession of the same, notwithstanding they knew he claimed the same under the above mentioned agreement. That the complainant not having any other except an equitable interest in the lands, was unable to defend the possession thereof at law, and was obliged to suffer a judgment to be entered against him and seek his remedy in this Court (a) \*That 83

(a) In the trial of the ejectment referred to, brought by *Simpson et ux. Lessee vs. Saunders*, in the General Court at October Term, 1796, for Smith's Discovery and Jones' Inheritance, the plaintiff proved, that William Andrew being seized in fee simple of Jones' Inheritance, devised the same to the wife of Simpson, one of the lessors of the plaintiff. The defendant then produced the agreement, or instrument of writing, purporting to have been executed by Andrew, as set forth in the context, and prayed the Court to direct the jury, that if they should be of opinion, from evidence which might be offered, that the said instrument of writing was duly executed, then the effect of the instrument was sufficient to entitle the defendant to their verdict for the tract of land called Jones' Inheritance. But the defendant did not offer any evidence to prove the execution of the said writing.

Abraham Andrew, and Averilla Andrew, two of the witnesses to the agreement, are since dead, and the complainants were in danger of losing their proof to the execution of the said instrument of writing. Prayer, for *subpoena*, &c. and that Simpson and wife might be compelled to convey the premises in fee unto Elizabeth, one of the complainants, and that testimony might be taken and recorded in order to the perpetuating thereof, &c. Also prayer for an injunction against proceedings at law on the judgment in ejectment. *Subpoena* and injunction issued accordingly; and a commission issued *de bene esse* for taking testimony.

The answers of the defendants stated, that Saunders held the lands mentioned in the bill, during the life-time of Andrew, as a tenant, and that the same were never sold, or contracted to be sold by him to the complainants or either of them, and that the writing, or bond of conveyance, in the bill mentioned, was never executed by Andrew, but is a forgery. That Andrew devised the land to the defendant, Elizabeth.

Much testimony was taken under the several commissions which issued for that purpose, and the several exhibits proved.

Exhibit E—Is a letter dated Middle River Neck, October 20, 1773, from William Andrew to Robert Saunders, then of Queen Anne's County, viz. "Daughter Betsey has been talking to me about living over here, as she wants to come back, and if you will come over again, you may go to Bush River plantation, on halves, for seven years, and then the place shall be hers instead of the land Bond has recovered against me."

Exhibit R—Is a letter from William Andrew to Robert Saunders, without date, but is an answer to one from the latter to the former dated the 8th of December, 1781. \* "As to what you mentioned by W. Chambers concerning the company's land, if it runs as you say (a), you had better buy it, as I have no money to spare at this time. I think you may afford to buy that bit; and if you will, I will be up and be your security."

Exhibit X—Is a bond dated the 18th of July, 1800, executed by John Simpson to John Colvin, and conditioned for the conveyance to

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GOLDSBOROUGH, Ch. J. (CHASE, J. absent, DUVALL, J. concurred.) The Court are of opinion, that the instrument of writing produced, even though the same should have been duly executed, is not of effect to bar the plaintiff's recovery of the land mentioned. Verdict, guilty as to Jones' Inheritance, and not guilty as to Smith's Discovery. Judgment on the verdict: from which the defendant appealed to the Court of Appeals, where the judgment was affirmed at November Term, 1797.

*Key and Winchester*, for the plaintiff and appellee.

*Martin*, (Attorney-General,) and *Hollingsworth*, for the defendant and appellant.

(a) By a plot made of the lands, it appears that this tract run nearly through the middle of Jones' Inheritance.



Colvin of 75 acres of land out of Jones' Inheritance and Smith's Discovery, if ever they should be recovered into the possession of Simpson.

Exhibit Z—Is a letter from Simpson to Colvin, without date, and is as follows: "I have received two letters from you, the first I did not understand, but the second explained your meaning fully, which is, you will have money from me at any rate. First you say, the bond is not valid, now you threaten me with the sale of it. You tell me Hammond and I are in collusion. I tell you it is more probable that he and you are in collusion. Was not every thing that was done about that business at the particular request of you and your mother? And pray how is my interests connected with Hammond's? Exactly in the same way that I am connected with you, and every other person who has ever done any thing for me in Maryland, by paying an extravagant price for it all, or obligating myself so to do. You ask, if I expect to keep the bond until it becomes due, that I deceive myself. In one thing I am sure I am not deceived, that I shall not pay it twice, and I do not conceive it will be more expensive to pay it to another than to you. But you seem to think I must pay it to you, whether I will or not—In this let me tell you, you deceive yourself, and grossly too. You seem to think I cannot do without your mother's testimony, and that it is of essential importance to me. In this you are wrong. You never knew for what purpose I wanted her testimony, nor does she understand it herself, neither would I have told any of you, but it seems necessary to inform you to prevent you running yourselves into infamy, and such difficulties, that it will be impossible to extricate you from. The real intention on my part was to make her testimony good for nothing, which is done, she having already sworn on both sides of the question. Now you expose my bond for sale, the thing \* becomes public. It must and will be considered as a bribe for which she has perjured herself. To prevent any consequence of this kind, was my inducement for exacting a promise from you of keeping the thing an inviolate secret, and which you promised on your sacred honor to perform. It was a measure I disliked in every step, but your characters and interest being both connected with keeping the secret, and your most pointed promises so to do, I thought you might be trusted without risk to yourselves; but it appears as if avarice was superior to every other consideration with you, and that without looking forward at all. Would you have a little patience, the business is in such train that it cannot be long until you will get the money; but such imprudence on your part may put it off to a later period. How do you suppose, that in justice to myself I can pay any more money, when there is any uncertainty that I may never get any thing in return for it; and you will positively receive more clear profit on the final issue of this business than I shall. This suit has already cost me upwards of \$400, and will yet cost me a sum I cannot calculate, besides a great loss of time. What

you get, you get clear, and that without trouble or expense. Had you me in your power in such manner that you could force money from me in this way, would it not amount to absolute robbery? And do I deserve it at your hand in any respect? I have felt myself under obligations to your mother for her friendship, but if she is privy to this business, it is well calculated to cancel them all. I shall be in Baltimore in two or three weeks, and hope, in the mean time, you will think more prudently about this business, otherways you must make your best of it, and I shall never have any connexion with either of you again."

HANSON, C. (14th of March, 1805.) Without acting against the principles which have governed the Chancellor in several former decisions which have been affirmed on appeal, he cannot grant that which is prayed by the bill. It appears to him indeed, that no bill filed in this Court praying a decree to compel a conveyance of land on an alleged contract, has been more weakly supported by the admissions and proofs in the cause. But it would be irksome to the Chancellor, and he conceives it altogether unnecessary for him to give his opinion at large, and to \* remark particularly on the testimony. Decreed, that  
**86** the bill be dismissed, and the injunction heretofore issued be dissolved.

From this decree the complainants appealed to this Court, and the case was argued before CHASE, Ch. J. TILGHMAN, NICHOLSON and GANTT, JJ. by

*Martin, Ridgely, Shaaff, Johnson,* (Attorney-General,) and *Brice*, for the appellants (a), and by

*Key and Harper*, for the appellees.

CHASE, Ch. J. delivered the opinion of the Court. It appears to the Court, that the bond dated the 28th of December, 1777, from William Andrew to Robert Saunders, and wife, for the specific execution of which the bill was filed, has been well and sufficiently proved. The letter written by Andrew to Saunders, dated the 20th of October, 1773, shows the foundation on which the bond was executed, and exempts it from suspicion or fraud, or illicit contrivance. The bond may be considered as the fulfilment of the promise, made to the daughter, contained in that letter, and is strongly corroborated by the exhibits Z and R. The conflicting interests which prevailed in the family on the death of Andrew, the disputes consequent thereon, and contrivances formed by the parties to get as much of the property as could be obtained in the general scramble, have exhibited a scene of iniquity and corruption seldom brought to the view of a Court of justice.

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(a) They cited 2 *Str.* 1096; 1 *Blk. Rep.* 365; and 4 *Burr.* 2224, to show that a will might be established, though the three subscribing witnesses thereto denied their hand-writing.

The conduct of Saunders, although highly reprehensible, in the methods adopted and pursued by him to get a confirmation of his wife's right to the lands in question, or to secure it to himself, cannot defeat or diminish the wife's equitable right and interest thus acquired by her father's letter, confirmed by the possession given pursuant thereto, and by his bond to Saunders.

And for these reasons the Court do reverse the decree of the Chancellor, with costs to the appellants; and do decree, order and adjudge, that Simpson and wife, by a good and sufficient conveyance in law, do grant, convey and make over, to Elizabeth Saunders, and her heirs, for ever, the \* lands called Smith's Discovery and Jones' Inheritance; and that Simpson and wife be perpetually enjoined from proceeding at law on the judgment in ejectment obtained by them against Saunders and wife. 87

*Decree reversed, &c.*

#### CHENEY vs. RINGGOLD et al. Lessee.

Whether or not 20 years exclusive and unmixed possession of a tract of land by cultivation and general use, without an actual enclosure, is such a possession as will bar a recovery in ejectment? *Quere.*

Whether or not 20 years possession of a part of a tract of land by actual cultivation and enclosure, with an exclusive and unmixed enjoyment of all exterior to the enclosure, by sparsim cutting, and general user, will bar a recovery in ejectment of the parts not enclosed? *Quere.*

Where the plaintiff with title, having possession by enclosure and cultivation of a part of a tract of land, claiming the whole, and the defendant, without title, having possession by enclosure of a part of the same tract, with the use (by cutting timber, &c.) of the other parts not enclosed, the plaintiff is bound by the Act of Limitations, as to that part of the land which is in the possession of the defendant by actual enclosure for more than 20 years next preceding the bringing his ejectment, but not as to the parts used by the defendant exterior to the enclosure. (a)

When two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him, having the title, as in possession to the extent of his right. (b)

The Act of Limitations did not attach or run against the Lord Proprietary on any possession of vacant lands.

**ERROR** to the General Court. The defendant in error brought an action of ejectment in that Court, for a tract of land called The Number of Two, situate in Washington County, within the reserve of Conococheague Manor, and containing 1970 acres of land. The

(a) Affirmed in *Haye vs. Swan*, 5 Md. 246, and in *Armstrong vs. Risteau*, 5 Md. 275. See Rev. Code, Art. 64, sec. 20.

(b) Affirmed in *Casey vs. Inloes*, 1 Gill, 500. See *Hall vs. Gittings*, post, m. p. 112; *Ridgely vs. Ogle*, 4 H. & McH. 86; *Davidson vs. Beatty*, 3 H. & McH. 315, note (a.)

defendant, (the present plaintiff in error,) took defence on warrant, and plots were made. At the trial at May Term, 1803, the defendant offered in evidence, that several Manors existed in Maryland prior to the year 1730, which were the private property of the then Lord Proprietary, and that the following order issued from the Proprietary, on the 28th of June, 1731, to lay off reserves on and round his Manors, viz. "Sir, Whereas his Lordship, the right honorable the Lord Proprietary of this Province of Maryland, hath ordered to make a resurvey upon all his Honors, Manors and Lands, and to enlarge the same on both shores of this Province; I do hereby, in the name and behalf of the right honorable the Lord Proprietary, order and require, that you forthwith cause a reserve to be entered for his Lordship on all vacant lands, rough or cultivated, and on all lands that are or may become escheat or forfeit to his Lordship, adjoining to any of his said Honors, Manors or Lands, or within the distance of three miles from them, or any of them; and that you likewise acquaint the several surveyors within this Province thereof, that they may behave themselves accordingly. Given under my hand this 28th day of June, Anno Domini 1731.

BEND'T LEON'D CALVERT.

To Philemon Lloyd, Esquire, Deputy Secretary of Maryland.

"In pursuance of the above order, a reserve is hereby made for and to the use of his said Lordship, on all vacant lands, rough or cultivated, and on all lands that are \* or may become escheatable, **88** or any ways forfeit to his Lordship, adjoining to any of his Honors, Manors or Lands, or within the distance of three miles from them, or any of them. To all concerned." The defendant then read in evidence, the certificate of Conococheague Manor, whereby was resurveyed on the 25th of October, 1736, by order of Samuel Ogle, Esquire, Governor of Maryland, for the use of the Lord Proprietary, his Lordship's Manor of land, lying in Prince George's County, called Conegocheig Manor, according to its first intended bounds, beginning, &c. containing 10,594 acres of land. He then read in evidence the warrant which issued on the 6th of June, 1752, to Charles Cheney, for 50 acres, he having paid 50*s.* sterling, caution for the same; and he offered to prove, that in pursuance of that warrant, a survey was made for Cheney on the 15th of November, 1752, and a certificate thereof returned in 1762, for a tract of land called Cheney's Delight, containing 96 acres of land, to be held of Conegocheig Manor; and that the certificate of survey was examined and passed on the 30th of March, 1754, and the composition money was paid thereon in April, 1762. He also offered to prove, that Cheney immediately after the survey, entered on the land, claiming the whole as his right and property, and died in possession thereof in 1780; and that the certificate of survey, and the land therein included, called Cheney's Delight, are truly located by the defendant on the plots in this cause. And that Cheney built on, improved and

cultivated part, and cut and used the wood growing thereon, claiming the whole until his death, as his right and property; and that the defendant, on the death of Cheney, his father, entered on the said land, claiming the whole as his property, according to the location and certificate aforesaid. And that Cheney, the ancestor, and the defendant, planted orchards, and held by actual enclosure and cultivation for more than twenty-seven years next preceding the bringing of this ejectment, all that part of Cheney's Delight which is contained within the lines shaded blue, as located and described on the plots, claiming the enclosed land, and the whole of the tract, as their own proper estate and right; and that all the land, as located within Cheney's Delight, exterior to the enclosures shaded blue, has been claimed and used by Cheney, and those claiming under him, as part of Cheney's \* Delight, exterior to the enclosures shaded blue, has been claimed and used by Cheney, **89** and those claiming under him, as part of Cheney's Delight, ever since the year 1762, by cutting wood and rail, and other timber thereon, for the use and purposes of their dwelling and farm, on said land; and that no other person whatever has at any time used, enjoyed, or cut any of the wood or timber on the land, except Cheney, and that no person has claimed the same, or any part thereof, except that a claim has been set up by the lessors of the plaintiff, and those under whom they claim. That Cheney's Delight is included within the lines of a tract of land called The Number of Two. The plaintiff then showed in evidence, that on the certificate of survey of Cheney's Delight, no patent ever issued and that the reason why a patent was refused upon that certificate, is indorsed thereon in the words following, viz. "No patent to issue on this certificate, by order of his Excellency, being within the reserve of Conegocheigue.

Test. W. STEWART, Clk."

He then offered in evidence a patent for The Number of Two, (being part of the reserve around Conegocheigue Manor,) granted to John Morton Jordan on the 15th of July, 1768, and which is the land for which this ejectment is brought, and which is truly located on the plots. He then read in evidence a deed from Jordan to Thomas Ringgold, dated the 26th of October, 1770, for the land called The Number of Two; also the will of Thomas Ringgold, dated the 16th of February, 1774, whereby he devised the said land to Benjamin Ringgold, his son, in fee simple. And he proved, that B. Ringgold died on the 26th of August, 1798, without child, and intestate, whereby the said land descended to his three brothers, Thomas, Samuel, and Tench, and his sister Anna Maria, who before this ejectment was brought was and still is a married woman, the wife of Frisby Tilghman; that the last named Thomas Ringgold, by deed of bargain and sale, on the — day of October, 1798, conveyed all his interest in the said land to his two brothers Samuel and Tench, which said Samuel and Tench, together with Frisby Tilghman, and Anna

Maria his wife, are the lessors of the plaintiff. That Jordan, the patentee, entered upon The Number of Two, claiming title to the whole thereof, according to his right, until he sold the same to Thomas Ringgold. That T. Ringgold, \* after the conveyance from Jordan to him; B. Ringgold, after the death of his father, by his guardian and by himself; and the lessors of the plaintiff, after the death of B. Ringgold, respectively entered upon the said land, and by himself and themselves, and his and their tenants, possessed and enjoyed a part thereof by actual cultivation and enclosure, and claimed title to the whole thereof, according to his and their respective rights, viz. T. Ringgold until his death in November, 1776; B. Ringgold until his death in August, 1798; and the lessors of the plaintiff until the time of bringing this ejectment. That Jordan resided in the City of Annapolis, distant from the land upwards of 100 miles. That T. Ringgold, the elder, resided at Chester-Town in this State, distant upwards of 200 miles from the land; and that the guardian of B. Ringgold, during his minority, resided upwards of 100 miles from the land. That B. Ringgold was born on the 6th of January, 1774, and on the 17th of September, 1796, in the name of his lessee, he instituted an action of ejectment against the present defendant, in the General Court, for the recovery of the land now sued for by the present plaintiff, against the present defendant; and that the action was depending and undetermined when B. Ringgold died, and that it did abate by his death, and was so entered at October Term, 1798. The plaintiff also offered in evidence, by the same witnesses who were examined by the defendant, that they, the witnesses, always understood that Cheney's Delight was alleged to lie within the reserve of Conogochague Manor, and therefore the owners of Cheney's Delight could not obtain a patent therefor. The defendant then prayed the opinion of the Court, and their direction to the jury, that if they find the facts as stated by the defendant, that then the lessors of the plaintiff were barred from making title to any part of Cheney's Delight, for the reason that the same was included in the lines of The Number of Two, for which the ejectment is brought.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court refuse to give the direction prayed, being of opinion that nothing less than twenty years adverse possession, by actual enclosures, will bar or defeat the title of the plaintiff in this case. The defendant excepted. Verdict for the plaintiff according to his \* pretensions, except as to the lands located on the plots as included in lines shaded blue, as to which, verdict for the defendant. Judgment being rendered on the verdict for the plaintiff, the defendant brought a writ of error to this Court.

At December Term, 1806, the cause was argued before BUCHANAN, NICHOLSON, and GANTT, JJ.

*Key, Shaaff, and Hughes*, for the plaintiff in error, in their arguments cited 3 *Blk. Com.* 209; *Cullen vs. Johnson*, 2 *Str.* 1142; *Fisher vs. Prosser*, *Comp.* 217; *Exp. N. P.* 434; *Ridgely's Lessee vs. Ogle & Leonard*, 4 *H. & McH.* 123; *Ringgold's Lessee vs. Malott*, 1 *H. & J.* 299; *Russell's Lessee vs. Baker*, *Ibid.*, 71.

*Martin, Mason, and Johnson*, (Attorney-General,) argued for the defendant in error. *Curia Ad. Vult.*

At this term the Court pronounced their judgment.

BUCHANAN, J. (NICHOLSON, J. concurred, GANTT, J. dissented.) The facts stated in the bill of exceptions taken in this case are, that prior to the year 1730, several manors existed in Maryland, which were the private property of the then Lord Proprietary; that on the 28th of June, 1731, an order issued from the Lord Proprietary to lay off reserves on and around all his manors; that an order, the date of which does not appear, issued from Samuel Ogle, the then Governor of Maryland, to resurvey for the Lord Proprietary his manor called Conogochiegue Manor, in pursuance of which order, that manor was resurveyed, and a certificate thereof, dated the 25th of October, 1736, was made out by the proper officer, and returned to the land office; that a reserve was laid off, on and around the said manor, and that afterwards, on the 6th of June, 1752, Charles Cheney obtained a warrant from the land office; in pursuance of which a survey was made by the proper officer for and in his name, on the 15th of November, 1752, of a tract called Cheney's Delight, and a certificate thereof made out, which was examined and passed by the examiner-general on the 30th of March, 1754, and returned to the land office on the 17th of April, 1762, when the composition money thereon, and the rent to that day were paid, and on the 10th of June, 1767, the rent to that time was also paid; that on \* this certificate a patent was refused, because Cheney's Delight lay within the reserve of 92 Conogochiegue Manor, and that no grant has ever issued thereon; that on the 7th of March, 1769, John Morton Jordan obtained a patent for a tract of land called The Number of Two, being a part of the reserve around Conococheague Manor, from whom the legal title to The Number of Two is regularly deduced to the lessors of the plaintiff, and that Cheney's Delight lies within the lines of The Number of Two. That Charles Cheney, for whom Cheney's Delight was surveyed, and the defendant in the Court below, have lived thereon ever since the survey, using the parts exterior to the enclosures ever since the year 1762, by cutting wood, rails, and other timber thereon, for the use and purposes of the farm; and for more than twenty-seven years next preceding the institution of the suit, have been in the actual possession, by cultivation and enclosure, of a part of the land lying within the lines of Cheney's Delight, claiming title to the whole; and that the lessors of the plaintiff, and those under whom they claim, have, ever since the grant of The Number of Two, pos-

Maria his wife, are the lessors of the plaintiff. That Jordan, the patentee, entered upon The Number of Two, claiming title to the whole thereof, according to his right, until he sold the same to Thomas Ringgold. That T. Ringgold, \* after the conveyance  
**90** from Jordan to him; B. Ringgold, after the death of his father, by his guardian and by himself; and the lessors of the plaintiff, after the death of B. Ringgold, respectively entered upon the said land, and by himself and themselves, and his and their tenants, possessed and enjoyed a part thereof by actual cultivation and enclosure, and claimed title to the whole thereof, according to his and their respective rights, viz. T. Ringgold until his death in November, 1776; B. Ringgold until his death in August, 1798; and the lessors of the plaintiff until the time of bringing this ejectment. That Jordan resided in the City of Annapolis, distant from the land upwards of 100 miles. That T. Ringgold, the elder, resided at Chester-Town in this State, distant upwards of 200 miles from the land; and that the guardian of B. Ringgold, during his minority, resided upwards of 100 miles from the land. That B. Ringgold was born on the 6th of January, 1774, and on the 17th of September, 1796, in the name of his lessee, he instituted an action of ejectment against the present defendant, in the General Court, for the recovery of the land now sued for by the present plaintiff, against the present defendant; and that the action was depending and undetermined when B. Ringgold died, and that it did abate by his death, and was so entered at October Term, 1798. The plaintiff also offered in evidence, by the same witnesses who were examined by the defendant, that they, the witnesses, always understood that Cheney's Delight was alleged to lie within the reserve of Conogocheague Manor, and therefore the owners of Cheney's Delight could not obtain a patent therefor. The defendant then prayed the opinion of the Court, and their direction to the jury, that if they find the facts as stated by the defendant, that then the lessors of the plaintiff were barred from making title to any part of Cheney's Delight, for the reason that the same was included in the lines of The Number of Two, for which the ejectment is brought.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court refuse to give the direction prayed, being of opinion that nothing less than twenty years adverse possession, by actual enclosures, will bar or defeat the title of the plaintiff in this case. The defendant  
**91** excepted. Verdict for the plaintiff according to his \* pretensions, except as to the lands located on the plots as included in lines shaded blue, as to which, verdict for the defendant. Judgment being rendered on the verdict for the plaintiff, the defendant brought a writ of error to this Court.

At December Term, 1806, the cause was argued before BUCHANAN, NICHOLSON, and GANTT, JJ.



*Key, Shaaff, and Hughes*, for the plaintiff in error, in their arguments cited 3 *Blk. Com.* 209; *Cullen vs. Johnson*, 2 *Stra.* 1142; *Fisher vs. Prosser*, *Coup.* 217; *Esp. N. P.* 434; *Ridgely's Lessee vs. Ogle & Leonard*, 4 *H. & McH.* 123; *Ringgold's Lessee vs. Malott*, 1 *H. & J.* 299; *Russell's Lessee vs. Baker*, *Ibid.*, 71.

*Martin, Mason, and Johnson*, (Attorney-General,) argued for the defendant in error. *Curia Ad. Vult.*

At this term the Court pronounced their judgment.

BUCHANAN, J. (NICHOLSON, J. concurred, GANTT, J. dissented.) The facts stated in the bill of exceptions taken in this case are, that prior to the year 1730, several manors existed in Maryland, which were the private property of the then Lord Proprietary; that on the 28th of June, 1731, an order issued from the Lord Proprietary to lay off reserves on and around all his manors; that an order, the date of which does not appear, issued from Samuel Ogle, the then Governor of Maryland, to resurvey for the Lord Proprietary his manor called Conogochiegue Manor, in pursuance of which order, that manor was resurveyed, and a certificate thereof, dated the 25th of October, 1736, was made out by the proper officer, and returned to the land office; that a reserve was laid off, on and around the said manor, and that afterwards, on the 6th of June, 1752, Charles Cheney obtained a warrant from the land office; in pursuance of which a survey was made by the proper officer for and in his name, on the 15th of November, 1752, of a tract called Cheney's Delight, and a certificate thereof made out, which was examined and passed by the examiner-general on the 30th of March, 1754, and returned to the land office on the 17th of April, 1762, when the composition money thereon, and the rent to that day were paid, and on the 10th of June, 1767, the rent to that time was also paid; that on \* this certificate a patent was refused, because Cheney's Delight lay within the reserve of 92 Conogochiegue Manor, and that no grant has ever issued thereon; that on the 7th of March, 1769, John Morton Jordan obtained a patent for a tract of land called The Number of Two, being a part of the reserve around Conococheague Manor, from whom the legal title to The Number of Two is regularly deduced to the lessors of the plaintiff, and that Cheney's Delight lies within the lines of The Number of Two. That Charles Cheney, for whom Cheney's Delight was surveyed, and the defendant in the Court below, have lived thereon ever since the survey, using the parts exterior to the enclosures ever since the year 1762, by cutting wood, rails, and other timber thereon, for the use and purposes of the farm; and for more than twenty-seven years next preceding the institution of the suit, have been in the actual possession, by cultivation and enclosure, of a part of the land lying within the lines of Cheney's Delight, claiming title to the whole; and that the lessors of the plaintiff, and those under whom they claim, have, ever since the grant of The Number of Two, pos-

sessed and enjoyed a part thereof by actual cultivation and enclosure, claiming title to the whole, according to their right. It is contended, that the order to lay reserves around the manors of the Lord Proprietary, dated the 30th of June, 1731, was not applicable to the Conococheague Manor, which, as it is said, was surveyed in the year 1736, subsequent to the date of that order; that therefore the reserve on that manor was unauthorized and void, and that a patent for Cheney's Delight was improperly withheld. But the certificate of Conococheague Manor, dated the 25th of October, 1736, is evidently a certificate of resurvey recognizing an original, and having for its foundation an order from the Governor of Maryland to resurvey Conococheague Manor, and for any thing appearing in the record, the original survey of that manor may have been anterior to the date of the order to lay off reserves. But whether anterior or not, a reserve was made around Conococheague Manor, and afterwards the warrant granted to Cheney on the 6th of June, 1752, was located, (as appears by the foregoing statement of facts,) within the lines of that reserve; and for that reason it was ordered and determined, that a patent should not issue on the certificate of Cheney's Delight. And whether

**93** the \* judgment of the Judges of the land office, was correct or not, or whether the reserve laid off on Conococheague Manor was properly or improperly made, is not now for us to decide, nor is it material in the consideration of this case.

A patent did issue for The Number of Two, which does not appear to have been ever vacated; and so long as it remains unvacated, if there is no elder patent covering the same land, or other grant overreaching it in law, (neither of which appears,) it operates to vest in the patentee, and those claiming under him, the title to all the land lying within its lines, whether the order to lay off reserves is applicable to Conococheague Manor or not, and whether a patent for Cheney's Delight was properly or improperly withheld.

To recover The Number of Two, this suit was instituted, and defence was taken for Cheney's Delight, which, it appears, lies within the lines of The Number of Two, and for which no patent ever issued. Therefore the defence taken, was not on the title derived by grant, but grew out of the possession in the defendant, and Charles Cheney, under whom he claims, of a part of Cheney's Delight, by actual enclosure for more than twenty years before the time of bringing this suit, with a continued enjoyment from the year 1762, of the parts not enclosed, by cutting timber, &c. exterior to the enclosures. Hence the only question is on the operation of the Act of Limitations upon that possession.

I shall not go into an examination of the questions, whether twenty years exclusive and unmixed possession of a tract of land by cultivation and general use, without an actual enclosure, in such a possession as will bar a recovery in an action of ejectment? Or whether twenty years possession of a part of a tract of land by actual cultiva-

tion and enclosure, with an exclusive and unmixed enjoyment of all exterior to the enclosure by sparsim cutting and general user, will bar a recovery in ejectment of the parts not enclosed ? For although they are questions of considerable importance in this State, and whatever my opinion touching them may be, yet as they are not involved in this cause, it is not necessary, nor perhaps would it be proper, to decide upon them now.

\* The question in the Court below grew out of the facts existing in the cause; and that the opinion, from which this is an appeal, was given upon those facts, and with a view to the particular case then under consideration, is evident from the opinion itself, which is in these words: "Nothing less than twenty years adverse possession by actual enclosure will bar or defeat the title of the plaintiff in this case." And I concur with the General Court in that opinion, admitting all the facts stated in the bill of exceptions to be true. **94**

This is a case of two conflicting claims, in which the pretensions of both parties are set out. The lessors of the plaintiff with title, having possession by enclosure and cultivation of a part of the tract of land in dispute, claiming the whole; and the defendant without title, having possession by enclosure of a part of the same tract of land, with the use (by cutting timber, &c.) of other parts not enclosed. As to that part of the land which was in the possession of the defendant, and his ancestor, Charles Cheney, by actual enclosure for more than twenty years next preceding the bringing of this suit, the plaintiff is bound by the Act of Limitations; but not as to the parts used by the defendant exterior to the enclosure.

When two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him having the title as in possession to the extent of his right.

The Act of Limitations did not attach or run against the Lord Proprietary on any possession of vacant lands; and even if it could have run against him as to the land in question, he was not barred by the possession of Charles Cheney on the 7th of March, 1769, the date of the grant of The Number of Two.

And whatever might have been the effect in law of the use made by the defendant, and his ancestor, of those parts of The Number of Two, claimed by them exterior to the enclosures by sparsim cutting, for twenty years next preceding the institution of this suit, in case the purchaser had never entered and obtained possession before or during that user, and no mixed possession had followed; yet in this case it is stated, that John Morton Jordan, the grantee of The Number of Two, and those claiming under him, did immediately after the date of the grant, and \* within twenty years from the commencement of any possession in Cheney, enter upon and take possession of a part of The Number of Two, by actual enclosure and cultivation, claiming title to the whole, and have ever since so possessed and **95**

claimed; and the possession of part, gives in law a constructive possession of the whole. This principle may be extended to both parties in this case, and each may be considered as having been in possession of the land claimed by him, according to his right, and the true extent of his lines, with the exception of the parts enclosed by the other—the defendant of Cheney's Delight, and the lessors of the plaintiff of The Number of Two, which includes all Cheney's Delight; or in other words, the defendant of a part of The Number of Two, according to certain alleged lines, and the lessors of the plaintiff of all The Number of Two, except the parts thereof enclosed by the defendant. Their possessions, therefore, of those parts of Cheney's Delight not enclosed, or rather of the unenclosed parts of The Number of Two, claimed and used by the defendant, (for there appears to be no such grant as Cheney's Delight,) were mixed or conflicting possessions, on which the Statute of Limitations could not attach or run, so as to bar a recovery by the plaintiff, who, if the facts stated in the bill of exceptions are true, is the legal owner.

Even if the defendant's possession by enclosure commenced first, which is not stated to be the case, that, and his cutting timber exterior to the fences, could not have prevented the constructive possession vesting by operation of law, in Jordan, of all the unenclosed parts of The Number of Two, on the actual entry and enclosure made by him, and those claiming under him, upon a part of that tract of land, within twenty years from the date of the grant, claiming title to the whole. But if the possession, by enclosure, of the lessors of the plaintiff, and those under whom they claim, commenced first, and for any thing appearing in the record that may have been the fact, surely no cutting, &c. by the Cheney's, exterior to their enclosures, could so divest the possession, cast by law upon the plaintiff, of the unenclosed parts of The Number of Two, as to let in the operation of the Act of Limitations,

Upon the whole, I consider the question in this case to be, whether  
**96** twenty years mixed possession of unenclosed \* lands can operate to bar a recovery in ejectment by the rightful owner, he being one of the possessors?

On this question I feel no doubt, and therefore am of opinion that the judgment of the General Court ought to be affirmed.

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OWINGS *vs.* NORWOOD'S Lessee.

A memorandum made by a clerk in the record of a deed, stating that the date had been altered, &c. is not evidence, being an act done without authority, and will not invalidate the deed.

In executing a commission issued to a foreign country, for the purpose of

taking testimony, notice is not necessary, but time should be given, that the opposite party might exhibit cross-interrogatories. (a)

If the heirs of J. S. in whom was the title to land, were living in Great Britain at the passage of the Acts of confiscation, then an escheat warrant, issued to E. N. for the said land, issued without authority of law.

But a grant to him for the land surveyed under that warrant, came within the provisions of the 8th section of the Act of November, 1781, ch. 20.

Such grant is valid to pass the land to E. N. notwithstanding he had not paid more than two-thirds of the appraised value of the land.

The plaintiff on a judgment of condemnation on an attachment on judgment, where there was no *fleri facias* and sale of the land condemned, does not acquire a legal estate in the land by virtue of the judgment, attachment and condemnation. (b)

Land liable to confiscation, may be granted by the State, under an escheat warrant.

Such escheat grant will operate by relation, so as to give title from the date of the warrant or escheat. (c)

The 8th section of the Act of November, 1781, ch. 20, secured the land so escheated to the party, on his paying two-thirds of the value.

The State, by its commissioners, was in possession of all British property within the limits of the State, under and by virtue of the Acts of confiscation.

(a) Affirmed in *Calvert vs. Core*, 1 Gill, 119, and in *Parker vs. Sedwick*, 5 Md. 285. In the latter case it is said to have been repeatedly decided that, under a foreign commission, when interrogatories are filed time enough before the commission goes out to allow the opposite party an opportunity of filing cross-interrogatories, no notice need be given of the time and place, when and where the commission is to be executed. When the interrogatories are not thus filed, notice given by the commissioners of the time and place of taking the testimony is sufficient, but such notice from the attorney of the party, without the consent or approbation of the commissioners, is not sufficient. *Ibid*. There are two modes of giving notice of the execution of a foreign commission—1st, actual notice, given directly by the commissioner; 2nd, constructive notice given by filing interrogatories in the clerk's office before the commission goes out. *Hatton vs. McClish*, 6 Md. 407. The interrogatories must be filed a reasonable time before the commission goes out, so as to enable the opposite party to file cross-interrogatories. *Ibid*. Where the record shows that the defendant consented to the issuing of a commission to take testimony, and admitted service of the plaintiff's interrogatories before the commission was issued, he cannot be heard to object that it issued irregularly and without notice. *Cherry vs. Baker*, 17 Md. 75. Where a rule of Court requires the clerk, immediately on the filing of interrogatories under a commission to take testimony, to serve a copy of them on the adverse party, such service may be proved by parol. *Purner vs. Piercy*, 40 Md. 212. See Rev. Code, Art. 70, s. 31, (Code, 37, sec. 15); 2 *Poe's Pldg.* sec. 220; *Evans' Prac.* 331.

(b) So held in *Davidson vs. Beatty*, 3 H. & McH. 314. The laying of the attachment, or the seizure of property under it, creates an inchoate lien, which can only be perfected by judgment of condemnation, upon which the final process of execution issues. *Rhodes vs. Amsinck*, 88 Md. 555; see 2 *Poe's Pldg.* secs. 690, 697.

(c) Affirmed in *Smith vs. Devecmon*, 80 Md. 482.

No British subject could hold land in this State on the 19th of November, 1794, the time when the treaty with Great Britain was made.

Where certain facts would not warrant the presuming a mortgage made in 1706, was satisfied before 1780, the mortgagee being a resident of Great Britain, and although he was never in possession of the mortgaged premises—the party not showing any title under the mortgagor.

Where lands were mortgaged to a British subject, on failure of payment of the mortgage money, a complete legal estate vested in the mortgagee, liable to confiscation, and was vested in the State under the Acts of confiscation, subject to the right of redemption; and the British treaty cannot operate on such a case. (a)

Ancient deeds and release, not necessary to be recorded, may be read in evidence.

The Court would not direct the jury to presume a title had been perfected, deeds having been produced showing a defective title had been transferred. (b)

The Court would not direct the jury that the plaintiff's escheat grant did not pass the land, the defendant claiming the same under a defective title.

APPEAL from the General Court. The appellee brought an action of ejectment for a tract of land called The Discovery, lying in Baltimore County, containing 520 acres and a half acre of land. The defendant, (now appellant,) took defence on warrant, and plots were returned.

1. First bill of exception.—The plaintiff at the trial at May Term, 1804, read in evidence the patent of a tract of land called Brown's Adventure, granted to Thomas Brown on the 10th of November, 1695, for 1,000 acres. Also the grant to Norwood, the lessor of the plaintiff, for the tract of land called The Discovery, the land mentioned in the declaration, and for which this suit is brought, dated the 25th day of June, 1800, and granted in pursuance of a special warrant of escheat, obtained by Norwood out of the land office, on the 25th of October, 1795, to resurvey and affect a tract of land called Brown's Adventure, originally, on the 10th of November, 1695, granted to Thomas Brown, for 1,000 acres, who is stated to have died

**97** seized thereof \* intestate, and without heirs. In pursuance of which warrant the tract was found to contain, clear of elder surveys, the quantity of 494 and a half acres, to which was added 26 acres of vacant land, and Norwood, having paid the treasurer the sum of £578 18 4, being the purchase money due for the escheat land, and £4 17 6. being the composition due for the vacant land added, the State granted to him the land, resurveyed as aforesaid, with the vacancy added, and called The Discovery, agreeably to the

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(a) The mortgagee of a term has, after forfeiture, the whole legal estate therein, and is liable on the real covenants in the lease, whether he becomes possessed of or occupies the premises in fact or not. *Mayheir vs. Hardesty*, 8 Md. 479.

(b) Approved in *Colvin vs. Warford*, 20 Md. 396. See *Lloyd vs. Gordon*, 2 H. & McH. 157.

certificate of survey thereof returned into the land office, bearing date the 25th of April, 1796. The plaintiff also offered in evidence, that The Discovery is included within the lines of the patent for Brown's Adventure. The defendant then offered in evidence, that the great grandson, and heir at law of Thomas Brown, the first patentee, and others, his descendants, are alive at this time in this State. The plaintiff then read in evidence an office copy of a deed from Thomas Brown, the patentee, to John Gadsby, bearing date the 2d of May, 1700, for the land called Brown's Adventure, purporting to be sealed and delivered by Brown in the presence of Cha. Carroll and Thos. Bland, and having the following endorsements: May 4th, 1699. Then received of the within named John Gadsby, the sum of two pounds sterling, being for the fine due the right honorable the Lord Proprietary, upon the alienation of the land within mentioned. As witness my hand.

CHA. CARROLL.

"*Memorandum*.—That the date of this was originally according to the date of the above receipt, but aliened by consent of the Provincial Court and parties, to bring it within the Act of Assembly.

"W. TAYLARD.

"*Memorandum*.—This day, to wit, the tenth day of October, in the twelfth year of his Majesty's Reign, &c. *Anno Dom.* 1700, came into the Provincial Court the within named Thomas Brown, and Kath his wife, and the said Kath being secretly examined according to law, they did acknowledge the land and premises within mentioned to the within named John Gadsby, to be his right as of their gift, according to the Act of Assembly in that case made and provided. Taken and acknowledged in Court.

"W. TAYLARD, Clk."

\* The defendant then produced the record book, containing the said deed, with its several indorsements, and prayed the opinion of the Court, and their direction to the jury, that if they were of opinion that the indorsements were made at the request of John Gadsby, the grantee in the deed named, and with his privity and consent, and that the deed, with the several indorsements, were recorded for his benefit, and with his assent, that then the indorsements on the deed by the plaintiff produced, are competent to be read in evidence to support the facts therein contained, against the title of Gadsby, to the land in the deed mentioned. 98

CHASE, Ch. J. (DONE, J. concurred.) The Court are of opinion, that the memorandum on the deed from Thomas Brown to John Gadsby, endorsed, to wit—" *Memorandum*.—That the date of this was originally according to the date of the above receipt, but aliened by consent of the Provincial Court and parties, to bring it within the Act of Assembly. W. Taylard,"—is not evidence, being an act done by Taylard without authority, and that the deed is valid and operative in law to transfer the land to Gadsby.

SPRIGG, J. observed, that when he sat alone at the trial of this case at the last term, he considered the memorandum as having been made by an officer having authority to make it; but since, upon reflection, he finds that he was wrong in the opinion which he gave. He concurs with the Court in the opinion given, that it was an act done by Taylard without any authority. The defendant excepted.

2. The defendant then offered to read in evidence a commission, issued from this Court on the 12th of November, 1802, and certain depositions taken thereunder, and returned to this Court on the 10th of April, 1804. It appears that the defendant had, at May Term, 1801, obtained a commission to London for the purpose of taking testimony, and as the cause was then standing for trial, the commission was granted, with a proviso, that if it was not returned at the next term it would be no cause of continuance at that term on the part of the defendant. At \* October Term, 1801, the de-

**99** fendant filed interrogatories, and took out duplicate commissions. At May Term, 1802, the commission and depositions were returned, and the plaintiff obtained a continuance of the cause, and also a commission to London upon the same terms, that if it was not returned at the next term, it would be no cause of continuance, &c. At October Term, 1802, the defendant had leave to renew his commission upon the same terms as were originally granted, and he filed additional interrogatories, and issued the commissions, and sent a copy of his original and additional interrogatories with the commission, which was returned, with depositions, as before stated, and were now offered to be read, but which were objected to by the plaintiff's counsel.

CHASE, Ch. J. It appears that two terms have intervened since the commission was taken out by the defendant, and the plaintiff had sufficient time to send forward his interrogatories. The oath which the commissioners take, shows that they may receive additional interrogatories at any time before the commission is closed. In executing foreign commissions, notice is not necessary; but time should be given, that the opposite party might exhibit cross-interrogatories. The Court are of opinion, that the testimony taken under the commission may be read in evidence to the jury.

3. The second bill of exceptions.—The plaintiff then produced in evidence a deed from John Gadsby to John Barker, dated the 10th of July, 1701, for 130 acres, part of Brown's Adventure, describing the part by courses and distances, and calling the same Barker's Inheritance. Also a deed from Gadsby to Aaron Rawlings, for all the residue of Brown's Adventure, not conveyed to Barker, dated the 2d of October, 1703. Also a deed of mortgage from Aaron Rawlings to Jonathan Scarth, dated the 13th of May, 1706, for all the land included in the patent of Brown's Adventure, except the 130 acres conveyed to Barker, which deed of mortgage was to be void,



&c. on payment of £800 sterling money, with interest, on the 13th of May, 1709. He then offered evidence, that Barker and Scarth died before the year 1795, without heirs. He then offered in evidence an escheat warrant, to affect by escheat the whole of Brown's Adventure, for the want of \* the heirs of Thomas Brown, or "be it escheat by the means aforesaid, or by any other way or means whatsoever," granted to the lessor of the plaintiff on the 28th of October, 1795; also a certificate upon that warrant, returned to the land office on the 29th of September, 1796; also a caveat against a grant's issuing on the certificate by Edward Dorsey, on the 26th of August, 1796; also a second caveat entered against a grant's issuing thereon by William Hammond on behalf of The Baltimore Company, on the 10th of January, 1797; also an order of the Judge of the land office dismissing the caveat of Hammond on the 30th of September, 1797; also an order of the Judge of the land office permitting the caveat of Dorsey to be withdrawn, and that the same was withdrawn on the 24th of June, 1800; and also a patent issued upon the certificate to the lessor of the plaintiff for the land therein mentioned called The Discovery, bearing date the 25th of June, 1800. He then offered evidence, that Brown's Adventure and The Discovery are truly located upon the plots as the plaintiff hath thereon located them. The defendant then offered in evidence, that the descendants and heirs at law of Brown, the original patentee, were at this time in full life in this State; and that Scarth, the mortgagee in the deed from Rawlings, died in Great Britain, having always resided there, leaving issue an only son and heir at law, who during his life always lived and died in G. B. and left issue an only child his daughter and heir at law, who always resided in G. B. and married Francis Moore; that she and Moore, her husband, having always during their lives resided in G. B. afterwards died, leaving Frank Moore of G. B. their only son and heir at law, who is now in full life residing in G. B. where he always has resided, a British subject. The defendant then prayed the Court to direct the jury, that the warrant of escheat which issued to the lessor of the plaintiff, issued without the authority of law, the property being in the State of Maryland as confiscated property, and not liable to be affected by a warrant of escheat.

CHASE, Ch. J. (DONE, J. concurred. SPRIGG, J. gave no opinion.) The Court are of opinion, that if the heirs of Scarth were living in Great Britain at the passage of the Acts of October, 1780, ch. 45, ch. 49, and ch. 51, that \* the warrant of escheat which issued to the lessor of the plaintiff, issued without the authority of law; but that a patent which issued on such warrant came within the provision of the Act of November, 1781, ch. 20, s. 8.

4. The second bill of exceptions in continuation.—The defendant then offered in evidence the valuation of the land so escheated by

the lessor of the plaintiff, and the sum by him paid into the treasury for the land on the 24th of December, 1799, and that the sum so paid was only two-thirds of the appraised value of the land so escheated. And he then prayed the opinion of the Court, and their direction to the jury, that if they were of opinion that the lessor of the plaintiff had only paid two-thirds of the appraised value of the land so escheated, that then he could not entitle himself to the benefit of the warranty contained in the Act of November, 1781, ch. 20, s. 8.

CHASE, Ch. J. (DONE, J. concurred. SPRIGG, J. gave no opinion.) The Court are of opinion, that if the jury believe the facts stated, that then the patent was good, valid and operative in law, to pass the land to the lessor of the plaintiff, and his heirs, notwithstanding he had not paid more than two-thirds of the appraised value, the Court considering his case as coming fully within the provision of the eighth section of the Act of November, 1781, ch. 20, and that two-thirds of the value of the land was as much as he was liable to pay. The defendant excepted to this last opinion, and to so much of the preceding opinion as declares the patent to come within the provision of the 8th section of the Act of November, 1781, ch. 20.

5. The third bill of exceptions.—The defendant then read in evidence a record of the late Provincial Court of Maryland, of a judgment for attachment, recovered in that Court at April Term, 1732, by Littleton Waters against Jonathan Scarth, for £397 9 6, sterling money, and costs; also a record of that Court of a writ of attachment issued on that judgment by Waters, on the 15th of November, 1736, against the goods, chattels and credits, of Scarth; and a return made on that writ by the sheriff of Baltimore County, to whom it was directed, certifying that he had attached, as the goods and chattels of Scarth, a tract of land called Brown's Adventure, containing 870 acres, and  
**102** \* which he had caused to be appraised, &c. and an appraisement of the said land, amounting to £304 10 0 sterling money; upon which return judgment of condemnation in the usual form, was rendered at May Term, 1737. Other records of attachments and condemnation against sundry garnishees, and other lands to the amount of £298 12 6 sterling, were offered in evidence. The plaintiff, to show that the land, part of Brown's Adventure, affected by the attachment, was the 386 acres, located by him upon the plots, as the land, part of Brown's Adventure, in the possession of The Baltimore Company, read in evidence the late Lord Proprietary's old rent roll (a), kept and remaining in the land office, showing that Rawlings was in possession of 870 acres, and Barker was in possession of 130 acres, of that land; also the Proprietary's last rent roll (b), showing that Scarth was in possession of 419 acres, and Charles Carroll,

(a) Made about the year 1708, it is supposed, but there is no date to it.

(b) Made about the year 1730, it is supposed, but there is no date to it.

Esquire & Company, (commonly called The Baltimore Company,) were in possession of 386 acres of that land; also the Proprietary's debt book for the year 1754, which is the oldest debt book known of or can be found wherein it appears, that The Baltimore Company stand charged with quit rents upon the 386 acres of land, part of Brown's Adventure, and no more; and that Scarth, in those debt books stands charged with the quit rents upon 419 acres, part of that tract; and that the respective charges against The Baltimore Company, and Scarth, are continued, in like manner, upon the Proprietary's debt books, from the year 1754 until the commencement of the Revolution between Great Britain and America. The defendant then prayed the opinion of the Court, and their direction to the jury, that by virtue of the judgment, attachment and condemnation, by the plaintiff given in evidence, a legal estate was vested in Littleton Waters in the tract of land called Brown's Adventure.

CHASE, Ch. J. The Court are of opinion, that Littleton Waters did not acquire a legal estate in Brown's Adventure \*by virtue of the judgment, attachment and condemnation. The **103** defendant excepted.

6. The fourth bill of exceptions.—The defendant then read in evidence an Act of Assembly of November Session, 1797, ch. 119, entitled, "an Act to relinquish the right of this State to the lands therein referred to," and prayed the opinion of the Court, and their direction to the jury, that by virtue of that Act, the right of the State was so far vested in the persons possessing Brown's Adventure, under the condemnation aforesaid, that the lessor of the plaintiff could not in virtue of his warrant, certificate of survey and patent, have any right or title to the said land, or if any, then no more than the proportion or compensation to which a discoverer of confiscated property is entitled.

CHASE, Ch. J. The Court are of opinion, that the right of the lessor of the plaintiff to Brown's Adventure, attached on his obtaining his warrant of escheat, and that his right was saved and protected by the proviso in the second section of the Act of November Session, 1797, ch. 119. And the Court are of opinion that the grant to the lessor of the plaintiff operates to transfer to him the interest the State had in the land called The Discovery, from the time of the obtention of his warrant of escheat. The defendant excepted.

7. The fifth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that if the warrant of escheat, which issued to the lessor of the plaintiff, issued without authority of law, that then the warranty contained in the Act of November, 1781, ch. 20, s. 8, did not operate to give title to the lessor of the plaintiff; and that there can be no relation to a

warrant which issues without authority of law, or to a certificate made in pursuance of such warrant.

CHASE, Ch. J. The Court are of opinion, that the Act of November Session, 1781, ch. 20, s. 8, did secure to the lessor of the plaintiff the land so by him escheated, on his paying two-thirds of the value of the land, being what he was liable to pay for the same as confiscated British property; and that the grant obtained by him did operate to \* pass the land to him by relation, from the date of  
**104** the warrant. The defendant excepted.

8. The sixth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that if Brown's Adventure belonged to a British subject at the time of passing the Act confiscating British property in this State, and if no actual possession had been taken thereof by the State, or its agents, and no sale or disposition made thereof, by the State, to any person, at any time before the treaty between the United States and Great Britain, dated the 19th of November, 1794, took effect, that the lessor of the plaintiff could make no title thereto by his warrant, certificate of survey and patent.

CHASE, Ch. J. The Court are of opinion, that the State, by its commissioners, was in possession of all British property within the limits thereof, under and by virtue of the Act of Confiscation, October, 1780, ch. 45, and the Act of the same session, ch. 49, to appoint commissioners, &c. and that the possession of the land was in the State at the time the lessor of the plaintiff obtained his escheat warrant; and that no British subject could hold land in this State on the 19th of November, 1794, the time when the treaty was entered into between Great Britain and the United States of America. The defendant excepted.

9. The seventh bill of exceptions.—The plaintiff then offered in evidence, that Scarth died before the year 1795, without heirs, and that Barker left heirs now living in this State. Also an escheat warrant, to affect by escheat the whole of Brown's Adventure, except the 130 acres conveyed to Barker, granted to the lessor of the plaintiff, &c. The defendant then offered in evidence, that the lineal descendants, and heirs at law of Brown, the original patentee, were at this time living in this State. Also, that Rawlings, the grantee, died leaving heirs, and that the heirs and descendants of Rawlings are at this time living in this State. Also, that the descendants, and heirs at law of Scarth, are at this time alive and residing in Great Britain; and that Scarth was a merchant in the year 1706, residing in London, trading to the then Province (now State,) of Maryland; and that Scarth, and his descendants and heirs at law,  
**105** have from the year 1796, in succession, severally resided in Great Britain to this time, being British \* subjects, and never

were in this State. Also the will of Rawlings, dated the 25th of March, 1741, thereby devising that his lands, called Brown's Adventure and Young's Lot, be equally divided between his sons and daughters. Also that Waters is dead, and that his descendants and heirs are now living in this State. Also that The Baltimore Company, under whom the defendant claims, have been for fifty years last past in the actual possession and user of the whole of Brown's Adventure, by clearing and cutting the wood off the land for their iron works, and claiming the land; and that there has been no actual or mixed possession of any part of the land by Scarth, or by any person claiming under him, or by any person claiming adverse to The Baltimore Company. The defendant then prayed the opinion of the Court, and their direction to the jury, that if they find the facts stated by the defendant to be true, and that no payment of principal and interest due on the mortgage from Rawlings to Scarth was at any time paid, made or done, on or after the 13th of May, 1709, that then the jury may and ought to presume the mortgage satisfied before the year 1780, and that the plaintiff is not entitled to recover.

CHASE, Ch. J. The Court are of opinion, that the facts stated will not warrant the jury in presuming the mortgage was satisfied before the year 1780, inasmuch as Scarth was continually a resident of Great Britain, and although he never entered into possession of the land; yet a possession of The Baltimore Company of 50 years will not authorize the presumption of the payment of the mortgage money, as the defendant has not deduced or shown any title in them from Rawlings; and therefore the Court refuse to give the direction prayed. The defendant excepted.

10. The eighth bill of exceptions.—The defendant then prayed the opinion and direction of the Court to the jury, that if the facts are found true, as stated by the defendant, that then the Acts of Confiscation, of October, 1780, ch. 45, and ch. 49, vested no beneficial interest in this State in the lands mentioned in the mortgage from Rawlings to Scarth, but that the same, if it vested in this State under the Act of Confiscation, was liable to the equity of redemption in the heirs of Rawlings, the mortgagor, and that by operation of the British treaty, so far as the mortgagee could claim an interest in the mortgaged lands, the same was saved from confiscation by that treaty, and consequently the plaintiff is not entitled to recover. 106

CHASE, Ch. J. The Court are of opinion, that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee, liable to confiscation, and was vested in the State in virtue of the Act of Confiscation of October, 1780, ch. 45, and the Act of the same ses-

sion, ch. 49, to appoint commissioners, &c. subject to the right of redemption in the mortgagor, and his heirs; and that the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment. The defendant excepted.

11. The defendant then offered to read in evidence an original lease and release from Waters to Benjamin Tasker, and others, (The Baltimore Company,) which are not to be found upon any of the records of the State, and which are dated, the lease on the 20th, and the release on the 21st of June, 1738, reciting the judgment obtained by Waters, in the Provincial Court, for the condemnation of Brown's Adventure, mortgaged by Rawlings to Scarth the 13th of May, 1706, as the effects of Scarth, &c. and conveying to Tasker, and others, so much and such part of Brown's Adventure as should, according to the valuation, upon oath, returned into the Provincial Court, amount to £145 1 5 sterling money, &c. Neither of which deeds appear to have been acknowledged. The plaintiff objected to the reading of the deeds in evidence.

CHASE, Ch. J. The Court are of opinion, that the lease and release, being ancient deeds, not necessary to be recorded, may be read in evidence to the jury. They were accordingly read to the jury.

12. The ninth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that if they find the facts true, as stated by the defendant, that then the deeds of lease and release from Waters to Tasker and others, conveyed a legal title in the lands therein mentioned; and that if a legal title did not pass, that then the jury may and ought to presume a title in Tasker and others, to the whole of an undivided 386 \* acres  
**107** of land, being an undivided part of the 870 acres of land, mortgaged to Scarth, called Brown's Adventure.

CHASE, Ch. J. The evidence will not warrant the Court to direct the jury to presume that Scarth perfected the title of the defendant, deeds having been produced showing that a defective title had been transferred. Until all the money was paid, Scarth was not bound to convey or diminish the security he had acquired for the whole debt due to him. The Court refuse to give the opinion and direction as prayed. The defendant excepted.

13. The tenth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that as to all that part of Brown's Adventure, contained in the deeds from Waters to Tasker and others, under whom the defendant claims, the patent granted to the lessor of the plaintiff doth not give him a title thereto, or enable the plaintiff to recover the same.

CHASE, Ch. J. The Court refuse to give the opinion and direction prayed.

The defendant excepted. The verdict and judgment being for the plaintiff, the defendant appealed to this Court, where the cause was argued at December, 1806, before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Martin, Key and Harper*, for the appellant, in their arguments on the first bill of exceptions, contended, that every deed, to give it validity, must contain, at common law, 1. Indentation. 2. Sealing. 3. Delivery; and superinduced by the Act of 1699, ch. 42, two other requisites, 1. It must be acknowledged; and 2. It must be enrolled within twelve months from its date. They also contended, 1. That the deed from Brown to Gadsby appeared to have been executed *in pais* before Carroll and Bland, and sealed and delivered in their presence. 2. That the receipt of the alienation fine, as endorsed on the deed, stated that it was paid to Carroll on the 4th of May, 1699. 3. That there was strong evidence of the execution of the deed on that day, because Carroll, who gave the receipt, was a witness to its execution. 4. That it was unusual to pay the alienation fine before the execution of the deed, as it could not be demanded before execution, being a duty arising on the actual alienation, and not before. 5. That \* it was further established by the act of the clerk of the Court, who officially certified the alteration of the date, as a **108** proceeding in Court by the consent of the Court and the parties; which, when done, admitted the deed to be recorded. 6. That it was the official act of the clerk could not be doubted, because it was made under the eye of the Court, and with their consent, and endorsed on the original deed. 7. That it was endorsed at the request of the grantee, for his benefit, and to explain the date of the alienation fine. 8. That the memorandum, after so great a lapse of time, was the best evidence of the fact, and ought therefore to have been admitted in evidence as the act of the clerk in open Court, with the consent of the Court and the parties to the deed. They referred to *Gilb. L. E.* 108; *Markham vs. Gonaston*, *Cro. Eliz.* 626; *Cospey vs. Turner*, *Ibid*, 800; *The State vs. Oden* (a;); *Russell's Lessee vs. Baker*, 1 *H. & J.* 71; *Hoddy's Lessee vs. Harryman*, 3 *H. & McH.* 581; *Wood vs. Owings & Smith*, 1 *Cranch*, 239.

(a) In the case of *The State vs. Oden*, in the General Court at May Term, 1800, in debt on bond, the defendant pleaded *non est factum*, and that the bond was delivered as an *escrow*. At the trial the plaintiff offered to prove, that J. S. was indebted to the State, and that the defendant was indebted to J. S.; that it was agreed that J. S. should give up to the defendant his bond, and that the defendant should execute his bond to the State for the sum which he owed to J. S.—which was done. That the defendant's bond was presented to the State's agent, but which was refused to be received in discharge of the debt due to the State by J. S. and upon which bond this suit was brought in the name of the State for the use of J. S. The General Court refused to direct the jury that the bond was the deed of the defendant.

On the second bill of exceptions they contended, 1. That the land was not liable to escheat, there being heirs of Scarth; and they referred to the several Acts of Confiscation of October, 1780, ch. 45, ch. 49, and ch. 51. 2. That this was not a case within the warranty of the Act of November, 1781, ch. 20, s. 8. They cited 1 *Blk. Com.* 91. 3. That the land was liable to confiscation, and the title to it could only be obtained in a particular manner—by sale and deed; and that the land office had no power or authority over confiscated lands. They referred to Acts of 1785, ch. 81; 1785, ch. 66, ch. 88; 1788, ch. 49; 1789, ch. 47; 1791, ch. 77, s. 8; 1792, ch. 81, s. 6; 1793, ch. 64; 1795, ch. 6; 1796, ch. 12; 1799, ch. 80, s. 6; and 1800, ch. 62, s. 6. 4. That the patent was made without \* authority, and was void. They cited *Kelly's Lessee vs. Greenfield*, 2 *H. & McH.* 121.

On the third, fourth, and fifth bills of exceptions, they contended, 1. That this land was held under a judgment of condemnation on attachment. They referred to the Act of 1715, ch. 40; Stat. 5 Geo. II, ch. 7; *Plater's Lessee vs. Hepburn*, 3 *H. & McH.* 434; *Davidson's Lessee vs. Beatty*, *Ibid.*, 594. The Act of 1797, ch. 119. 2. That if it could not be legally held under that judgment, it was embraced by the releasing Act of 1797, ch. 119, unless it came within one of the provisos. 3. That the second proviso could not aid the appellee, for two reasons—1st. because Norwood was not an informer against confiscated lands; and 2nd. because the rights of informers extended not to the land, but to a certain part of the price. They referred to the Acts of 1785, ch. 88, s. 3; 1788, ch. 49, s. 2; 1789, ch. 47, s. 20; 1790, ch. 65; 1791, ch. 77, ch. 90; 1792, ch. 81; 1794, ch. 40, s. 7; and 1800, ch. 62. 4. That the only remaining question was, whether Norwood came within the first proviso; that is, whether at the time of passing this Act, (21st January, 1798,) he had a right in or to this land? They contended that the grant to Norwood could have no relation to the date of the escheat warrant, which had illegally issued; nor to the date of the certificate of survey, which was equally illegal, as there could be no relation to an illegal or tortious inception of title. 3 *Coke*, 286, 29 a; 2 *Ventris*, 200; *Townsend vs. Ash*, 3 *Atk.* 340; *Co. Litt.* 310 b; 3 *Shep. Abr.* 150, 151, 152; *Howard vs. Cromwell*, 4 *H. & McH.* 325, and 1 *H. & J.* 115; *Peter vs. Mains*, 4 *H. & McH.* 423; *Hammond vs. Norris*, in the General Court, (see *post.*)

On the sixth and eighth bills of exceptions, they contended, 1. That the Confiscation Act excepted debts, and, by an equitable construction, it excepted all the incidents to and securities for debts. They cited *Pow. on Mort.* 13, 15, 16, 178, 179. 2. That if mortgages were affected by the Act of Confiscation, still the treaty of peace protected them, and operated as a repeal *pro tanto*. They referred to the treaty of peace of 3d of September, 1783, Art. 4, 5, 6; *Ware*



vs. *Hylton*, 3 *Dall*, 199; *Clerke vs. Harwood*, *Ibid*, 342; and the treaty of the 19th of November, 1794, Art. 9.

\* On the seventh bill of exceptions they contended, that the nature and length of the possession of the appellant, and those under whom he claimed, to the exclusion of all others, and there being no demand of the mortgage debt, were sufficient for the Court to have directed the jury to presume the mortgage debt had been satisfied. **110**

On the ninth and tenth bills of exceptions, they cited *Warren vs. Greenville*, 2 *Str.* 1129; *Bridges vs. The Duke of Chandos*, 2 *Burr*. 1065; *Anonymous Case*, 1 *Ventris*, 257; *The Mayor of Hull vs. Horner*, *Cowp.* 102; *Eldridge vs. Knott*, *Ibid*, 214; *Cocksedge vs. Fanshaw*, *Dougl.* 119; 12 *Coke*, 5; The Act of 1797, ch. 119; *Carroll et al. Lessee vs. Norwood*, 4 *H. & McH.* 287.

*Ridgely, Mason, and Johnson*, (Attorney-General,) for the appellee. in their arguments on the first bill of exceptions, insisted, 1. That the acknowledgment of the deed from Brown to Gadsby was no proof that there was a delivery before that time. 2. That the memorandums taken together, prove that there was a delivery at that time. They cited *Smartle vs. Williams*, 1 *Salk.* 280; *Markham vs. Gonaston*, *Cro. Eliz.* 626, 627.

On the second bill of exceptions, they contended, 1. That the land was liable to escheat, and that the escheat grant was *prima facie* evidence of an escheat. That if Scarth, or his daughter, died after the 4th of July, 1776, and before the Act of Confiscation, then the land escheated to the State, as the next heir being an alien could not inherit; and that it was incumbent on the appellant, who claimed against the escheat grant, to prove that this did not happen. 2. That admitting the land to have been liable to confiscation, and not escheat; still the grant ought to pass it; because, at the time of the grant, the price of escheat and confiscated lands were the same. 3. That at the time of making the grant, the Chancellor had authority to grant confiscated lands under the Acts of 1793, ch. 64, and 1795, ch. 6. 4. That he had general authority to judge and decide in disputes respecting the title of confiscated lands, and that he did so on Hammond's caveat; and his decision ought to be final under the Acts of 1785, ch. 66; April, 1787, ch. 30, s. 4, and 1789, ch. 35, s. 4. 5. That the grant was protected by the warranty clause in the Act of November, \* 1781, ch. 20, s. 8. They referred to 2 *Blk.*

*Com.* 249. The several Acts of Confiscation before referred **111** to; and the Acts of November, 1781, ch. 20, s. 8, s. 6, 17; 1793, ch. 64; 1795, ch. 6; 1785, ch. 66, ch. 88, s. 3; and April, 1787, ch. 30, s. 4; *Wynne vs. Wynne*, 1 *Wils.* 43; *Goodtitle vs. Bailey*, 2 *Cowp.* 600; *Walton vs. Shelley*, 1 *T. R.* 296; *Buckland vs. Tankard*, 5 *T. R.* 578; *Rex vs. The Bishop of Chester*, &c. 2 *Salk.* 561; *Kelly's Lessee vs. Greenfield*, 2 *H. & McH.* 140; *Hammond et al. Lessee vs. Norris*, in

the General Court, (see *post*;) *Goodtitle vs. Morgan*, 1 T. R. 758; *Gittings, Jr. Lessee vs. Hall*, in the General Court, (see *post*, 112.)

On the third bill of exceptions they referred to the Acts of 1715, ch. 40, s. 7, and 1797, ch. 119. *Rex vs. Deane*, 2 Show. 85; *Taylor vs. Cole*, 3 T. R. 296; *Davidson's Lessee vs. Beatty*, 3 H. & McH. 594.

On the fourth bill of exceptions they referred to the Acts of 1797, ch. 119; November, 1781, ch. 20, s. 6, 8; and 1789, ch. 35, s. 5.

On the seventh bill of exceptions they contended, that the mortgage from Rawlings to Scarth, by lapse of time and the long possession of the mortgagee, had become an absolute estate, and the equity of redemption was gone. They cited 1 *Fonbl.* 323; 2 *Fonbl.* 269; *Cook vs. Arnham*, 3 P. Wms. 288, (*note*).

On the eighth bill of exceptions they referred to the Acts of April, 1782, ch. 60, s. 7, 8; and 1784, ch. 81. *Strithorst vs. Grame*, 2 W. Blk. Rep. 723.

On the ninth and tenth bills of exceptions they cited *Denn vs. Barnard*, 2 Cowp. 597; *Davidson's Lessee vs. Beatty*, 3 H. & McH. 594.

*Curia ad. vult.*

The Court of Appeals, at this term, affirmed the judgment of the General Court, concurring in the opinions expressed in all the bills of exceptions.

The appellant considered this was a case arising under a treaty, within the meaning of the Constitution of the United States, and that the Supreme Court had appellate jurisdiction therein, he therefore sued out a writ of error under the provisions of the 25th section of the Act of Congress, entitled, "An Act to establish the Judicial

**112** Courts of the United \* States," passed on the 24th of September, 1789; but the Supreme Court, considering it not to be such a case, dismissed the writ of error. 5 *Cranch*, 344.

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HALL vs. GITTINGS, Junr's, Lessee.

GITTINGS, Junr's, Lessee vs. HALL.

No adversary possession of land can avail against the State. (a)

Lands which escheated to the Lord Proprietary, were by the Acts of October, 1780, ch. 45, and ch. 49, confiscated to and vested in the State, without office found, or an actual entry.

(a) But by Rev. Code, Art. 69, sec. 9, whenever land shall be taken up under a common or special warrant, &c. any person may give in evidence his possession thereof, and if it shall appear that such person, or those under whom he claims, have had possession for twenty years before the action brought, such possession shall be a bar to all right or claim derived from the State under any patent issued upon such warrant.

An adversary possession commencing against the Proprietary, ceased to operate against the State after the Act of Confiscation. (a)

The Act of October, 1780, ch. 49, vested the seisin and possession of all lands liable to confiscation in the commissioners, on behalf of the State, and divested the possession of all other persons.

If two persons are in possession of land, the one by right, and the other by wrong, it is the possession of him who is in by right. (b)

If land liable to escheat is included in a survey and grant under an escheat warrant on another tract of land, such grant will operate to pass a good title to the land so included, if there has been possession and payment of quit rents for more than 20 years before the Act of Confiscation.

Land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract, but which afterwards became escheat, will not pass under such grant, and the State is not estopped from granting it to any other person. (c)

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(a) Approved in *Armstrong vs. Morrill*, 14 Wallace, 146, when the Court said: "Beyond all question, the case of *Hall vs. Gittings*, presented the same question as that involved in the case before the Court, and the decision was that the forfeiture to the State within the period necessary to give effect to the statute, did have the effect to break the continuity of adverse possession, and prevented the operation of the statute bar."

(b) Affirmed in *Casey vs. Inloes*, 1 Gill, 500. As against a wrong-doer, claiming title by possession only, the law is the same whether the real owner be in actual possession of any part of the land or not. *Hoye vs. Swan*, 5 Md. 238. Title to land draws the seisin to it, so that one having such title is, by force thereof, in possession of the whole until ouster of some one entering with claim of adverse possession. *Ibid.* In this case the Court said: "The doctrines of adverse possession are treated of in *Casey vs. Inloes*, 1 G. 500, and the cases of *Davidson vs. Beatty*, 3 H. & McH. 621; *Cheney vs. Ringgold*, 2 H. & J. 87, and *Hall vs. Gittings*, are there referred to as establishing title by constructive possession, where the real owner is in possession of part of his land. We do not understand the learned Judge who pronounced that opinion to have confined the principles there stated to cases of actual mixed possession, but to have extended them to all cases where real estate is claimed by a wrong-doer, relying on possession alone against the real owner. \* \* *Hall vs. Gittings*, was not a case of actual possession of any part of the land during the time of the alleged adversary possession of the defendant. The question was whether the commissioners appointed to preserve confiscated property by the Act of 1780, c. 49, were seised and possessed of confiscated lands without actual entry, and the Court held that, by operation of the Act, the commissioners were in possession, as agents of the State, from the time of its passage. \* \* The constructive possession of the commissioners ousted the actual possession of the wrong-doer." 5 Md. 249.

(c) Escheat land must be taken up by a warrant of escheat, and if, under such a warrant, it is included as vacancy, the title does not pass to the patentee, but remains in the State. *Smith vs. Baker*, 4 Md. Ch. 29. Escheatable lands taken up as vacancy, may subsequently be granted to another under an escheat warrant. *Ibid.* But, if there be no fraud or imposition practised upon the State, and a party has purchased and paid for lands supposed to be vacant, but which in fact came to the State by escheat, and the party receiving the grant has exercised acts of ownership over the land for a period to give him the protection of Art. 57, sec. 9, of the Code, he ought not to be disturbed, or have his title brought into question, by a subsequent

An escheat grant relates to, and operates to pass the whole of the original tract escheated. (a)

If there are two descriptions of the land conveyed, the one by name, and the other by metes and bounds, &c. the grant will operate to pass the land according to that description which is most beneficial to the grantee. (b)

If the testimony of a witness is intended to be objected to because of his holding adjoining lands, &c. his interest must be located on the plots.

The declarations of a former holder of the adjoining lands, as to the bounds of the land in dispute, admitted in evidence, it not appearing by the plots that he was interested in establishing the truth of the facts related by him.

Whether or not a will was legally executed and proved, are matters of fact for the jury; and where the will was made in 1683, they may and ought, from the length of time elapsed, to presume that it had been duly executed and proved. (c)

The jury were directed on certain evidence of title and descent, that if true, then land which had been granted as escheat land was not escheatable, although for upwards of 100 years no person ever claimed the land under the original grantee.

In ejectment the plaintiff must recover on the strength of his own title. The defendant may prevent his recovery, by showing a title in himself, or a clear subsisting title in a stranger (d)

grant issued to another person upon an escheat warrant. *Armstrong vs. Bittinger*, 47 Md. 103.

(a) Affirmed in *Casey vs. Inloes*, 1 Gill, 507, and it was so held in *Jones vs. Badley*, 4 Md. Ch. 167.

(b) Affirmed in *Mundell vs. Perry*, 2 G. & J. 206. Cf. *Hawkins vs. Hanson*, 1 H. & McH. 298; *Helms vs. Howard*, 2 H. & McH. 33; *Norris vs. Pottet*, 4 H. & McH. 333; *Buchanan vs. Stewart*, 3 H. & J. 329; *Bryan vs. Harvey*, 18 Md. 113. But general words in a deed may be restricted by a specific description in an annexed schedule. *Mims vs. Armstrong*, 31 Md. 87. The rule is one of rigor and is not to be resorted to except where other rules of exposition fail. *Varnum vs. Thurston*, 17 Md. 470; *Carroll vs. Granite*, 11 Md. 399.

(c) In *Hale vs. Monroe*, 28 Md. 114, the Court said that in *Hall vs. Gittings*, the will, made in 1683, was proved by an exemplification taken from the records of the Prerogative office. One of the witnesses proved that the testator executed the same. Another witness proved her mark, and that the remaining witness was dead. It was not the case of a lost will, or of a copy that had been recorded. "We think the Court went quite far enough in that case, and we do not consider ourselves authorized to extend the indulgence, or to allow the doctrine of presumption to go beyond the verge of that case. While we recognize its authority where there is a similar state of facts or proof, we cannot permit ourselves, by charitable construction to be given to ancient documents, to disregard the plain and imperative mandates of the law." And it was accordingly held that, where an original will was lost and a copy thereof made from memory was admitted to probate, a certified copy of this paper was inadmissible in evidence to show a devise of real estate, and that the jury could not presume the existence of the will from the probate thereof.

(d) Affirmed in *Lannay vs. Wilson*, 30 Md. 546, the Court saying that where the plaintiff in ejectment shows a *prima facie* good title, it is incumbent on the defendant, setting up an outstanding title by way of defence, to establish the existence of such title with clearness and precision; and generally

Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of the land, i. e. he who hath the *jus possessionis*.

A clear subsisting title, outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties. (a)

Land is not escheatable as long as there are heirs of the original tenant or grantee.

Escheat is that possibility of interest which reverts to or devolves on the lord upon the failure of heirs of the original grantee, and he cannot grant the land again until that event happens; and if he does his grant will pass nothing. (b)

An escheat grant is *prima facie* evidence of title; but being only a presumption of right in the Proprietary, it only exists until the contrary is proved. (c)

Nothing but 20 years adversary possession can defeat a title acquired under a legal grant.

The jury were directed, that if they believed certain facts, then the presumption of law was, that G. H. for whom the land in dispute was surveyed on the 14th of October, 1683, and granted to him the 10th of August, 1684, was seized thereof at the time of his will dated the 19th of February, 1683, and his death in 1685, and that the land passed to his devisee under the residuary clause in his will.

CROSS-APPEALS from the General Court. This was an action of ejectment for a tract of land called Friendship Completed, lying in Baltimore County. The defendant (Hall) in the Court below, took

a title of such nature as to entitle the stranger to recover in ejectment against either of the contending parties.

(a) Affirmed in *George's Creek, &c. vs. Detmold*, 1 Md. 234, 238.

(b) Affirmed in *Casey vs. Inloes*, 1 Gill, 509, and in *Brown vs. Shilling*, 9 Md. 80, where the Court said that it was settled in the case of *Hall vs. Gittings*, that an escheat patent was only *prima facie* evidence of title and might be rebutted, by showing that the former owner did not die intestate and without heirs, as suggested by the party applying for such patent, and that this decision was not overruled by *Cook vs. Carroll*, 6 Md. 104. Cf. *Howard vs. Moale*, *post*, m. p. 249; *Guyers vs. Smith*, 22 Md. 289.

(c) Affirmed in *Clement vs. Ruckle*, 9 Gill, 328, and in *Hammond vs. Inloes*, 4 Md. 172. If the junior grant recites an escheat the elder patent must give place to it, unless it be shown that the land had not escheated. The *onus probandi* is shifted. *Hammond vs. Inloes*, *supra*. "In 2 H. & J. 126, the principle is stated to be that an escheat grant is *prima facie* evidence of title and is available for that purpose until the contrary is proved. It is not necessary or usual according to the practice of the land office, to state on the face of the patent whose lands were escheated, or the facts or circumstances which show the lands were escheatable. Where a warrant issued regularly, has been executed by the proper officer, and a certificate returned which has laid a sufficient time in the land office without caveat, to justify the emanation of a grant, it is but a fair, reasonable, *prima facie* presumption, that the land taken up was escheatable, and that the title passed to the grantee." *Lee vs. Hoge*, 1 Gill, 201, which case is approved in *Armstrong vs. Bittinger*, 47 Md. 103.

defence on warrant for a tract of land called Tolly's Purchase, granted under an escheat warrant on Cullen's Lot, and part of Cullen's Addition.

1. At the trial at May Term, 1802, the defendant offered to prove, that George Holland, the patentee of Holland's Park, died before the year 1760, intestate, and without issue, not having conveyed that land, and leaving no heirs capable of inheriting. That in the year 1774, Walter Tolly \* entered on and became possessed *prout*  
**113** *lex postulat*, of the lands located on the plots in this cause, surrounding red M, N, and P, claiming the same as his own, and in virtue of his patent for Tolly's Purchase. That the land included in the black lines on the plots shaded yellow, surrounding red M, and the land in the blue shaded lines surrounding red N, and the land in the yellow lines surrounding red P, were in the year 1774 actually enclosed by Tolly, and that he died in the year 1783, in the actual seizin and possession, (so far as he could be seized and possessed thereof against the State,) of the land so enclosed, and devised the same to the wife of the defendant. That the defendant, in virtue of his marriage and the devise, entered upon the said lands in the year 1783, (so far as he could be seized and possessed against the State,) claiming the same, and has ever since remained in such seizin and possession thereof. That the whole of the three pieces of land has been under actual enclosure of fences from the year 1774 to this period, by Tolly in his life-time, claiming the same, and from the time of his death by the defendant, claiming the same. That Tolly in his life-time, and the defendant since his title accrued under the devise, and his entry, have paid quit rents to the Proprietary in his time, and taxes and assessments to the State, since the year 1780, for Tolly's Purchase; and that no actual entry ever was made by the State, or any person on behalf of the State, on any of the lands herein before described, except the surveyor, who on the 30th day of March, 1796, entered on the same to make the survey, on which the lessor of the plaintiff afterwards obtained a patent including the said lands, for the recovery of which this suit is instituted. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that they being satisfied as to the true location of Holland's Park, the same being land escheated to the Proprietor, and by the Act of Confiscation vested in the State, no adversary possession on the part of the defendant can avail against the State, so long as the title thereof remained in the State.

*Martin*, (Attorney-General,) and *Mason*, for the plaintiff, referred to the Acts of Assembly of October, 1780, ch. 45, and ch. 49.

\* *Key*, *Hollingsworth* and *Harper*, for the defendants, cited  
**114** *Kelly's Lessee vs. Greenfield & Sothoron*, 2 H. & McH. 121; *Russell's Lessee vs. Baker*, 1 H. & J. 71; *Ringgold's Lessee vs. Malott*, 1 H. & J. 299; 2 Blk. Com, 75, 257; *Murray & Sansom vs. Ridley's Adm'r*, 3 H.

& *McH.* 171. The Acts of Assembly, October, 1780, ch. 51, s. 5; and November 1781, ch. 20, s. 8, 17. *Burgess vs. Wheat*, 1 *Wm. Blk. Rep.* 174.

CHASE, Ch. J. (DUVALL and DONE, JJ. concurred.) The Court are of opinion, that there is no adversary possession on the part of the defendant which can defeat the right derived from the State. Under the Act of October, 1780, ch. 49, the State became actually possessed of the land; and that Act dispenses with the requisites necessary in the case of the crown, to avoid a possession adversary to the rights of the crown, to wit, an office found, or an actual entry. By an office found in England, the crown becomes actually seized and possessed of any escheat land in question. The State then had the right to pass the Act of Assembly; and by that Act the State by its commissioners, was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant, or those under whom he claims.

This case has been argued upon the principle of the land's being held under the idea of its being part of Tolly's Purchase. The Court considers it as distinct from Tolly's Purchase, and as having no connexion with the question. It has also been contended by the defendant's counsel on the principles decided in former cases. The Court do not consider this case as affected by former decisions. In *Kelly's Lessee vs. Greenfield & Sothoron*, and *Russell's Lessee vs. Baker*, the lands had been granted by common warrants, and afterwards taken by escheat warrants, and there the grantees under the common warrants, had had the adversary possession for the full length of time, to wit, twenty years. But in this case the State, by the Act of 1780, having vested complete possession in its commissioners, the adversary possession, (as stated in the case, commencing at farthest in 1774,) could only have continued till the passing of that Act. If there had been a subsequent entry and possession of the land by the defendant, or those under whom \* he claims, there must have been a continuance for twenty years of that adversary possession to defeat the right of the State's grantee. 115

The opinion of the Court, as contained in the bill of exceptions which was taken at the trial, is as follows, viz. "The Court are of opinion, and so direct the jury, that in this case the Act of Assembly which passed in October, 1780, ch. 49, vested the actual seizin and possession of the said land in the commissioners appointed to preserve confiscated British property, as fully and amply as if the said commissioners, as the agent or trustee of the State, had made a formal entry on the same. That the commissioners were in possession of the said land in virtue and by operation of that Act, from the time of passing the same; and although the defendant, or those under whom he claims, continued in the actual possession of the said land, it was the possession of the commissioners on behalf of the State; for

where two persons are in possession, the one by right, and the other by wrong, it is the possession of him who is in by right.

"The Court are also of opinion, that the possession of the defendant, or those under whom he claims, was divested by the said Act of Assembly, and that the Act of Limitations ceased to have operation, or to run from that time, and that he has no right to the said land in virtue of the said possession. That the said possession not being derived from the Proprietary, but taken and held in opposition to his title, the defendant cannot have any equitable interest in the land, or claim to the same upon the State, as standing in the place of the Proprietary." The defendant excepted.

2. The plaintiff, to make title to the land called Friendship Completed, in the declaration of ejectment mentioned, read in evidence the grant thereof for 39 and one-quarter acres and 20 perches, surveyed on the 30th of March, 1796, for, and granted on the 14th of March, 1798, to, the lessor of the plaintiff, in virtue of a special warrant of escheat issued on the 29th of April, 1795, to resurvey and affect a tract of land called Holland's Park, granted to George Holland. He also read in evidence the grant of Holland's Park, surveyed the 14th of **116** October, 1683, and \* granted the 10th of August, 1684, to George Holland, for 150 acres. The defendant then, in order to make title to that part of Tolly's Purchase surveyed the 15th of December, 1757, for and granted to, Walter Tolly, on the 14th of August, 1759, read in evidence the grant thereof, being in virtue of a special warrant of escheat upon Cullen's Lot, granted to Thomas Greenwin, for 300 acres, and Cullen's Addition, granted also to Greenwin, for 500 acres. He then read in evidence the will of Tolly, the patentee, dated the 26th of July, 1781, by which he devised Tolly's Purchase to the wife of the defendant, who is still living; and he proved that Tolly died, possessed thereof, in the year 1783. He then offered evidence to prove, that from the time of the grant for Tolly's Purchase, the quit rents on that tract had been paid by Tolly, to the agents of the Lord Proprietary, until the year 1776, and that the other taxes and county assessments imposed on lands had also been paid by Tolly, and those claiming under him, for Tolly's Purchase. He then offered evidence to prove, that from the time of obtaining the grant for Tolly's Purchase to the present time, Tolly, and those claiming under him, have been in the possession and occupation of that land, claiming title to the same. He then offered evidence to prove, that his location of Tolly's Purchase, and for which he has taken defence, and which is described by the plots and the table of courses No. 15, is the true original location of that land, and that part of the plaintiff's pretensions for Friendship Completed, interferes with, and runs foul of Tolly's Purchase. He then prayed the opinion of the Court, and their direction to the jury, that admitting Holland's Park, mentioned in the grant of Friendship Completed, was liable to escheat at the time of the survey and grant to Tolly's Pur-



chase, and part thereof was included in the grant of Tolly's Purchase, then the subsequent grant of the escheat on Holland's Park, called Friendship Completed, to the lessor of the plaintiff, could not operate to give him title for any part of the land which was included in the escheat grant to Tolly.

*Harper and Johnson*, for the defendant, cited 4 *Bac. Ab. tit. Estoppel*, 107; *Co. Litt.* 47, 227 a, 352, 58; 4 *Co.* 53.

*Martin*, (Attorney-General,) and *Mason*, for the plaintiff, cited *Coke Litt.* 3; 4 *Bac. Abr. tit. Estoppel*, 107; *The \* Proprietary vs. Jennings et al.* 1 *H. & McH.* 92; *The State vs. Reed*, 4 *H. & McH.* 6. **117**

CHASE, Ch. J. The Court are of opinion, and so direct the jury, that if Holland's Park was escheatable at the time of the grant of Tolly's Purchase, and possession and payment of quit rents followed for more than twenty years before the Act of Confiscation, then the grant for Tolly's Purchase operates to convey a good title to all the land contained within the lines of the grant. But if Holland's Park was not escheatable at the time the grant of Tolly's Purchase was obtained, that in such case no part of Holland's Park, which is included within the lines of Tolly's Purchase, passed to Walter Tolly under the grant, and the State was not estopped from granting Friendship Completed to the lessor of the plaintiff.

The Chief Judge observed, that the Court considered this decision conformable to that in *Kelly's Lessee vs. Greenfield & Sothoron*. He cited *Blackston vs. Johnson*, in the General Court for the Eastern Shore, where he said it was decided, that an escheat grant related to the original grant. The defendant excepted.

3. The defendant then, to support his location of Tolly's Purchase on the plots, offered in evidence the certificate and grant of that land, surveyed (in virtue of a special warrant of escheat,) on the 15th of December, 1757, for, and granted on the 14th of August, 1759, to Walter Tolly. In which it was stated, that there "was laid out for Walter Tolly the tracts of land called Cullen's Lot, and such part of the tract of land called Cullen's Addition, as is escheat, according to their ancient metes and bounds, as showed. Beginning for Cullen's Lot at a bounded red oak, being the second boundary of the land called Trueman's Acquaintance, and running thence N. W. 96 perches, N. E. 500 perches, S. E. 96 perches, and then with a straight line to the beginning, containing and laid out for 300 acres more or less. Beginning for the part of Cullen's Addition, supposed to be escheated, at the end of the N. E. 500 perches line of the land called Cullen's Lot, and running thence N. E. 142 perches, S. E. 284 perches, S. W. 142 perches, and then with a straight line to the place of beginning, containing and laid out for 252 acres more or less." Which being reduced into one entire tract—"Beginning at a bounded red oak, it \* being the original beginning tree of Cullen's Lot, and **118**

the second boundary of Trueman's Acquaintance, and running thence N. W. 96 perches, N. E. 642 perches, S. E. 284 perches, S. W. 142 perches, N. W. 188 perches, and then with a straight line to the beginning, containing and laid out for 552 acres, more or less." He also offered in evidence the certificate of survey of a tract of land called Double Purchase, surveyed on the 29th of January, 1785, for, and granted the 11th of October, 1796 to, Aquila Hall, the defendant. In which it is stated, that there "was laid out for the said Hall, in virtue of a special warrant dated the 22d of December, 1784, by directions of the commissioners for confiscated British property, 166 acres of land, lying within the reserve of Gunpowder Manor, a tract or parcel of land adjoining Gunpowder Manor, and adjoining a tract or parcel of land called Tolly's Purchase, beginning at a bounded stone set up by said Hall, at the end of 784 perches, on the first line of Gunpowder Manor, and running thence with and bounding on the manor reverse of the same S. 39° 52' W. 784 perches, to a stone marked W. T. being the beginning of the manor, and a boundary of Tolly's Purchase, and the second boundary of Cullen's Lot, thence bounding on Tolly's Purchase N. E. 784 perches, and thence by a straight line to the beginning, containing and laid out for 166 acres more or less." He also offered in evidence that Tolly, the patentee of Tolly's Purchase, died in March, 1783, seized of the lands contained within the metes and bounds of that tract, according to the said location; and by his will devised that tract to the wife of the defendant, who has since the death of Tolly, continued in the actual seizin and possession thereof, until this time. He also offered in evidence that he purchased of this State some time in the year 1785, the tract of land called Double Purchase, as located on the plots, as part of Gunpowder Manor, which manor is also located on the plots, and obtained a grant therefor from the State on the 11th of October, 1796. He also offered in evidence that Tolly, during his life, and before and until the American Revolution, paid the quit rents due upon Tolly's Purchase to the agents of the Proprietary down to the year 1776; and after that time he, the defendant, paid the taxes due thereon under the laws of the State. The plaintiff then offered in evidence a certificate of survey of Cullen's

**119** Lot, \* (surveyed for James Cullen on the 17th of June, 1683, under a warrant dated the 20th of April, 1683,) "lying in Baltimore County, at the head of Gunpowder River, on the N. side of the S. branch of the said river, beginning at a bounded red oak, the bounded tree of the land called Trueman's Acquaintance, and running from said oak N. W. for breadth 96 perches, to another bounded red oak, then with a line drawn N. E. for the length of 500 perches to a bounded poplar, then running S. E. 96 perches to a bounded red oak, from thence with a straight line drawn S. W. to the first bounded tree, containing 300 acres." Also the certificate of survey of Cullen's Addition, (surveyed for James Cullen the 25th of September, 1683, under a warrant dated 30th of July, 1683,) "lying in Baltimore

County, upon the head of a river called Gunpowder River, beginning at the end from the N. E. line of the land called Cullen's Lot, and running from the end of the said N. E. line N. E. 284 perches, from thence with a line drawn S. E. 284 perches to a marked poplar, then running S. W. 284 perches, from thence running by a direct line to the first bounded tree, containing 500 acres more or less." He also offered in evidence that Cullen's Lot, Cullen's Addition and Tolly's Purchase, are truly located on the plots by him the plaintiff. The defendant then prayed the opinion of the Court, and their direction to the jury, that no boundary being called for at the end of the first line of Tolly's Purchase, and the second line not calling to bind on or run with any other land, the said first line must stop at the number of perches called for, and cannot be extended further.

CHASE, Ch. J. The Court are of opinion, that the true and legal exposition of the grant of Tolly's Purchase was to convey all the land comprehended within the true location of Cullen's Lot, and that part of Cullen's Addition which was escheated. That where there are two descriptions of the land intended to be conveyed, the one by name, and the other by metes and bounds, or courses and distances, the grant will operate to pass the land according to that description which is most beneficial to the grantee.

The Chief Judge observed, that if A. is possessed of two tracts of land, Black \* Acre and White Acre, and grants White Acre, the youngest tract, by metes and bounds, which metes and bounds **120** interfere with the lines of Black Acre, then the grantee takes by metes and bounds; for the deed must be taken most favorable for the grantee. This question, he said, was decided in the late Provincial Court, and affirmed in the present Court of Appeals. *Hawkins vs. Hanson*, 1 H. & McH. 523. The defendant excepted.

4. The plaintiff, to establish the location of Thompson's Choice, as located by him on the plots, gave in evidence a plot of the lands called Thompson's Choice, Cullen's Lot, Cullen's Addition, Hill's Forest, Tasker's Camp, Holland's Park, (the last tract granted to the defendant,) and Jamaica, which plot was made by a certain Darby Ensor a witness sworn in this cause; and the plaintiff offered to prove by Ensor, that the said plot was made by him from runnings directed by the defendant, and made by him, Ensor, as deputy surveyor of Baltimore County, in virtue of a warrant of resurvey issued from this Court in an action of ejectment brought therein by the lessee of the present defendant against a certain Thomas Gittings. And the plaintiff offered also to prove, by the testimony of James Gittings, of Thomas, that the place where Ensor run from as the beginning of Thompson's Choice, in the said runnings from which the said plot so produced was made, was the same place as located on the plots in this cause at black H. But the defendant objected to James Gittings, of Thomas, being sworn in chief, and

that he was not a competent witness to prove that the place where the defendant had directed Ensor to run from, in the runnings from which the said plot was made, was the same place which is located by the plaintiff on the plots at H; and offered to prove to the Court, that James Gittings, of Thomas, was the owner of a part of Thompson's Choice; and produced the certificates of the surveys of Hill's Forest, and Holland's Park, granted to George Holland. The former of those tracts was surveyed on the 4th of October, 1684, and the latter on the 14th of October, 1683, and they are both stated as lying in Baltimore County, in the woods, above the head of a river called Gunpowder River. The former tract began at a bounded red oak standing at the end of the N line of Thompson's Choice, and the latter began at a bounded tree standing at the end of Hill's Forest.

**121** \* CHASE, Ch. J. The Court are of opinion, that James Gittings, of Thomas, be admitted as a witness to prove the fact stated by the plaintiff. The Chief Judge cited *Hawkins vs. Beanes & Middleton*, 2 H. & McH. 119; *Chapline vs. Keedy*, 3 H. & McH. 578, and *Gittings vs. Hall*, 1 H. & J. 23, to show that it had been decided, that if the testimony of a witness, who is interested, is intended to be objected to, the land, in which the witness is alleged to be interested, must be located on the plots. The defendant excepted.

5. The defendant produced a witness, who deposed, that 18 years ago he lived with Charles Ridgely, who had then purchased part of Trueman's Acquaintance, a tract of land located on the plots. That Ridgely told him that an agreement had been before entered into between Thomas Gittings, the owner of Thompson's Choice, and James Greenfield, the owner of part of Trueman's Acquaintance, (which part he had sold to Ridgely;) that the place designated on the plots as the end of the first line of Thompson's Choice, according to one of its locations as made on the plots, should be fixed as one of the boundaries of that part of Trueman's Acquaintance, which Greenfield had held and sold to Ridgely. The plaintiff then prayed the Court for their opinion and direction to the jury, that the declarations of Ridgely, (who is dead,) so given in by the witness above stated, was incompetent and inadmissible, he Ridgely, being interested in establishing the truth of the facts by him related to the witness.

CHASE, Ch. J. The Court are of opinion, that the declarations of Ridgely are competent and admissible evidence to the jury, it not appearing to the Court, by the plots, that he was interested in establishing the truth of the facts related by him to the witness. The plaintiff excepted.

6. The defendant, in order to show that the land claimed by the plaintiff was not escheatable for the want of the heirs of George Holland, the patentee, offered to read in evidence an exemplification

of the will of Holland, taken from the records of the late Prerogative office, dated the 19th of February, 1683, whereby, amongst other things, he devised as follows, viz. "And all the rest of my lands, \* goods and chattels, I give and bequeath unto John Larkin, of Anne Arundel County aforesaid, innholder, and to his heirs and assigns for ever." The will was signed, sealed, and attested thus: **122**

"GEORGE HOLLAND, [L. S.]

"Signed, sealed and delivered, in the presence of

Wm. Lathorp, Ann x Tovey, Diana D. Parkes."

And thus endorsed: "June the 22d, 1685, came before me William Lathrup and Anne Tovey, *alias* Joce, the said Lathrup took his corporal oath, that the within was signed, sealed and delivered, as the act and deed of the said George Holland, Ann Tovey, *alias* Joce, took her corporal oath that she did believe that the within signed was her mark—the said Diana, *mortu est*. "*Jurat coram me*

JAMES RINGGOLD."

The plaintiff objected to the same being offered in evidence, because it did not appear that the will, if executed at all, was attested by the witnesses in the presence of the testator; and because it was not the original will, and did not appear to have been proved, so as to authorize the same to be recorded.

CHASE, Ch. J. The Court are of opinion, that the above circumstances are matters of fact to be determined by the jury; and that they may and ought, from the length of time which has elapsed since the making of the will, to presume that they were complied with. The plaintiff excepted.

7. The plaintiff then offered in evidence an escheat warrant obtained by Walter Tolly on the 6th of September, 1782, on Holland's Park; that Tolly died a few months after the date of that warrant, and that the defendant, who intermarried with the daughter of Tolly, obtained an escheat warrant on the 22d of August, 1783, on the same \* land, for want of heirs of George Holland, the grantee; that he returned a certificate of survey on the 1st of **123** July, 1784, and obtained a patent therefor, by the name also of Holland's Park, on the 13th of May, 1785; and that the land, so granted to the defendant, is truly located by the plaintiff on the plots. The plaintiff then offered in evidence, that John Larkin, the devisee in the will of George Holland, died intestate in the month of February, 1702, leaving Thomas Larkin, the other devisee in the said will, his heir at law, who married about the 2d of September, 1697; and gave in evidence the will of T. Larkin, dated the 10th of April, 1731, in which Holland Park is not mentioned; but there is a recital of a mortgage of sundry tracts of land executed by the testator to the heirs of Amos Garrett, more than sufficient to pay the debt for which they were mortgaged, and he desired that they might be sold, &c. He devised other lands to his daughter Elizabeth. That T.

Larkin died in May, 1731, leaving his daughter Elizabeth, the devisee in the will mentioned, his heir at law. He also offered in evidence the will of E. Larkin, dated the 25th of January, 1735, in which no mention is made of Holland's Park, nor is there any residuary clause; and that she died unmarried, on the 4th of February, 1735. He also offered in evidence the deed of mortgage referred to in the will of T. Larkin, in which mortgage Holland's Park is not mentioned. He also offered evidence that Zachariah Maccubbin intermarried with Susanna, his wife, on the 20th of July, 1704, and died about the month of December, 1756, leaving Nicholas Maccubbin his son and heir, and that N. Maccubbin died about the month of March, 1787, aged about 85 years, leaving Nicholas Carroll (a), of the City of Annapolis, his heir. He also gave in evidence, that N. Maccubbin was a sensible, intelligent man, possessed of a large fortune, and very careful and attentive to his interest. He further offered in evidence, that from the time of the grant to Holland, until the present time, no person has been known to have ever actually possessed or claimed Holland's Park, claiming it as such, except the lessor of the plaintiff, and the defendant, under their escheat grants aforesaid. And further, that no person of the name of Larkin or Maccubbin, or of any other name, has been known to set up a title to, or to claim

**124** \* the said land, except under the escheat grants aforesaid. Also, that Tolly lived adjoining the said land during the whole of his life, and was an old man at the time of his death; and also that the defendant is an attorney of great legal information, and has been in the practice of the law for near or quite thirty years. The defendant then read in evidence the certificate and grant for Holland's Park, granted to George Holland; and gave in evidence that Holland afterwards died, having devised the land in fee to John Larkin; that J. Larkin died, and left issue two children, Thomas, his heir at law, and Hester; that T. Larkin afterwards died, leaving issue an only child, a daughter, named Elizabeth, which Elizabeth died without issue. That Hester, the sister of T. Larkin, and aunt to Elizabeth, intermarried with a certain Nicholas Nicholson, by whom she had issue Susanna, her only child and heir at law. That Susanna, after the death of Hester, intermarried with Zachariah Maccubbin, by whom she had issue N. Maccubbin, her eldest son and heir at law; that N. Maccubbin, after his mother's death, died, leaving issue a son named N. Carroll, his heir at law, now in full life, living in the City of Annapolis. He also offered evidence to prove that Holland, the patentee, J. Larkin, his devisee, and the before mentioned T. Larkin, E. Larkin, H. Nicholson, S. Maccubbin, N. Maccubbin, and N. Carroll, his son, have severally, at all times during their respective lives, lived and resided in Anne Arundel County in this State; that the land called Holland's Park was originally located

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(a) Name changed from Maccubbin by Act of Assembly.

in Baltimore County, and that no person or persons ever built on, improved or cultivated the said land, or any part thereof, before the defendant in this cause in 1775, and the lessor of the plaintiff in 1795, except part thereof which had been occupied by a certain James Gittings, and that the residue of the land lay waste and unimproved. He further offered in evidence the original debt books of Baltimore County, and entries therein of the agents of the Proprietary, on one of which, viz. in 1769, is an entry in these words: "Gideon Linthecum Dr. To Holland's Park, 150 acres, 6s." and opposite thereto the following entry viz. "Can't find any such person or land." And an entry on the rent roll in the land office, made about the year 1772, in these words, viz. "150. Holland's Park, surv'd. 14th October, 1683, for George Holland, above the head of Gunpowder River. \* Poss. 150. 6s. Gideon Linthecomb. The bounds of this land being lost, the land cannot be found; nor is there 125 any such person in being as Gideon Linthecomb." He also offered evidence to prove, that the tract of land in the said entries mentioned, was the same land which was surveyed for Holland, and patented to him by the grant herein before referred to; and that it is the land located by the defendant and the plaintiff on the plots, and that it is truly located by the defendant. He then prayed the direction of the Court to the jury, that if the facts in the above statement are true, that then the legal title to Holland's Park is in N. Carroll, the heir at law of N. Maccubbin; that the land was not liable to escheat, and that the lessor of the plaintiff is not entitled to recover the said land, in the declaration mentioned, under his escheat grant in 1798.

CHASE, Ch. J. The Court are of opinion, and so direct the jury, that if they find the facts stated by the defendant to be true, that the legal title to Holland's Park is in Nicholas Carroll, the heir at law of Nicholas Maccubbin, and that the said land not being escheatable, the plaintiff is not entitled to recover the said land, in his declaration of ejectment mentioned, under the escheat grant to the lessor of the plaintiff in 1798.

In ejectment the plaintiff must recover on the strength of his own title. The defendant may prevent his recovery by showing a title in himself, or by showing a clear subsisting title in a stranger.

Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of the land, i. e. he who hath the *jus possessionis*.

A clear subsisting title outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties.

Land is not escheatable as long as there are heirs of the original tenant or grantee.

Escheat is that possibility of interest which reverts to, or devolves on the lord, upon the failure of heirs of the original grantee; and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing, and cannot impair any right or interest acquired under his original grant.

**126** \* The escheat grant is *prima facie* evidence of title; but being only a presumption of right in the Proprietary, it can only exist until the contrary is proved; and if the jury find the facts stated by the defendant, there is evidence of a clear subsisting title in the heirs of George Holland, under the grant to him. Holland's Park having been legally granted to George Holland, nothing can defeat his title, and the title of his heirs, to the said land under his grant, but twenty years adversary possession.

The Court are of opinion, that if the jury find the facts stated, a title has been legally deduced from George Holland, the patentee of Holland's Park, to Nicholas Carroll, and that the right to Holland's Park now subsists in him. The plaintiff excepted.

8. The plaintiff also offered in evidence, an entry on the old rent roll in the land office, made about the year 1710, in these words, viz. "150 acres of Holland's Park, surv'd 14th October, 1683, for George Holland, above the head of Gunpowder River, at a bounded tree at the end of a parcel of land called Hill's Forest, and now in possession of John Ford of A. A. County." Also an extract from the land office of the following tracts of land having been patented to George Holland, viz. Collet's Neglect, Holland, Denton, Holland's Delight, Holland and Holland's Advent. Also a record of a suit brought by *N. Macubbin's Lessee vs. Medford*, about the year 1766, for establishing the bounds of a tract of land lying in Kent County, devised to Maccubbin by Col. Richard Bennett, and which suit was tried at the assizes held in Queen Anne's County. The defendant then prayed the Court to direct the jury, that if they believe the facts to be true as stated by him, that then the presumption of law is, that George Holland was seized of Holland's Park at the time of his will and death, and the same land passed to Larkin, his devisee, and no presumption from the facts stated on the part of the plaintiff can arise, that Holland was not seized of the said land at the time of his will and death.

THE COURT directed the jury accordingly. The plaintiff excepted.

Verdict, part for the plaintiff, and part for the defendant, and judgment thereon for the plaintiff. Both parties appealed to the late Court of Appeals, and at November Term \* 1805, the **127** points arising on the bills of exceptions, (the four first taken on the part of the defendant, and the other four on the part of the plaintiff,) were argued in that Court, on the cross-appeals, by

*Pinkney, Key, Shaff*, and *Harper*, for Hall, and by *Martin*, (Attorney-General,) for Gittings' Lessee.



The then Court of Appeals not having given judgment when the Legislature passed the Act of 1805, ch. 16, abolishing that Court, these appeals were, by the Act of the same session, ch. 65, transferred to the present Court of Appeals, and were argued at June Term, 1806, before TILGHMAN, BUCHANAN, NICHOLSON and GANTT, JJ. by

*Harper and Johnson*, for Hall, who referred to *Russell vs. Baker*, 1 H. & J. 71; *Kelly vs. Greenfield*, 2 H. & McH. 121; *Bro. Ab. tit. Prerogative*, s. 91; 2 *Hawk.* 448; *Bro. 34*; 4 *Co.* 48, 58; 3 *Blk. Com.* 308, 379; 2 *Ib.* 347, 379, 380; 10 *Vin. Ab.* 454, 455, pl. 9, 10; 482, pl. 1; 484, pl. 15; *Co. Litt.* 45 a, 47 b, 352 a; *Litt. sec.* 58; 6 *Mod.* 258; 3 *T. R.* 441; 4 *Supp. to Vin. Ab.* 127; 2 *T. R.* 171; 4 *Com. Dig.* 78, 81, 84; *Attorney-Gen. vs. Snowden*, 1 H. & J. 332; *Moale vs. Howard*, post; *Owings vs. Norwood*, ante, 96; *Hawkins vs. Hanson*, 1 H. & McH. 523; *Dorsey vs. Hammond*, 1 H. & J. 193; 2 *Shep. Ab.* 279; 14 *Vin. Ab.* 78, pl. 8; 2 *Roll. Ab.* 50; *Bac. Ab. tit. Grant*; *Co. Litt.* 42; *Bac. El. c.* 3; *Hob.* 71; *Hands vs. James*, 2 *Com. Rep.* 531; 2 *Stra.* 1109; 5 *Bac. Ab.* 508; *Clayland vs. Pearce*, 1 H. & McH. 29; *Carroll vs. Llewellyn*, *Ibid.*, 162.

\* *Martin*, for Gittings' lessee, on the first bill of exceptions, referred to the Acts of October, 1780, ch. 45, and ch. 49; 2 **129** *Hawk.* 448, ch. 49, s. 1, 2; *Bro. Ab. tit. Prerogative*, 143 b, pl. 91; *Ibid.*, tit. *Devant*, 109 a, pl. 34; *Savil*, 7, (18th case;); *Ibid.*, 70, (145th case;); *Stanf. Pre.* 54 a; 2 *Roll. Ab.* 184, pl. 1, 2, 3, 4; 4 *Coke*, 58; *Taylor vs. Horde*, 1 *Burr.* 60.

On the second bill of exceptions, 10 *Vin. Ab.* 470, pl. 9; 482, pl. 1; *Co. Litt.* 47 b; 352 a; *Hath's Lessee vs. Polk*, 1 H. & McH. 363.

On the third bill of exceptions, 2 *Shep. Ab.* 281; 14 *Vin. Ab.* 80, pl. 21; 83, pl. 41; 2 *Bac. Ab.* 661, 662; *Bac. El.* 86; 2 *Mod.* 3; *Bulst.* 177; 2 *Leon.* 235, *Trapp's Case*; *Clayton*, 14, *Bradford's Case*; 3 *Coke*, 9, *Douties' Case*; *Broun.* 42.

On the sixth bill of exceptions he cited *Collins vs. Nicols*, 1 H. & J. 399.  
*Curia ad vult.*

\* The Court of Appeals, at the present term, affirmed the judgment of the General Court on both appeals, concurring in **130** the opinions pronounced in the several bills of exceptions.

TILGHMAN, J. gave no opinion on the third bill of exceptions.

#### HAMMOND et al. Lessee vs. NORRIS.

A deed located on the plots, and not counter-located by the opposite party may be read by the party locating it, to show how it is located, but when its validity comes in question if it is bad, it is to have no effect. (a)

(a) By Rev. Code, Art. 64, sec. 26, counter-location is made unnecessary.

The clerk of a Court has no authority by law to certify a fact under seal; his duty is to grant exemptions. (a)

Parol evidence is not admitted to prove that a tract of land included in a certificate of survey, never was actually surveyed by the surveyor. (b)

Parol evidence admitted with the consent of the parties, to prove the law, practice and usages, of the land office, before the Revolution.

The efficient qualities of the different kinds of warrants used to take up vacant lands, set out. (c)

A person who takes out a warrant of resurvey, without having a title to the original tract resurveyed, acquires an equitable interest in the vacant land added, when the composition money is paid; and his grant therefor will relate to the date of the certificate of resurvey, if it appears that his certificate was returned to the land office previous to the time when a prior grant for the same land issued on a junior certificate of survey, made and compounded on after the composition money was paid upon his certificate, and unless it was so returned, the prior grantee was a fair purchaser without notice of such equitable interest, and his grant cannot be overreached or defeated by relation. (d)

The Court refused to direct the jury, that if they were satisfied from the evidence, that by the rules of the land office the certificate of resurvey, under which the plaintiff claims, was liable to be vacated upon a caveat,

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(a) See Rev. Code, Art. 57, sec. 1.

(b) See *Hammond vs. Sheredine*, 4 H. & McH. 268.

(c) See *Garretson vs. Cole*, 2 H. & McH. 305, *note*.

(d) In *Hoye vs. Johnston*, 2 Gill, 316, the Court said that it was determined in the case in the text that, although a person who has not a title to the land on which he obtains a warrant of resurvey cannot thereby claim a right of pre-emption in all contiguous vacancy, yet such a warrant will operate as a common warrant. In *Buckingham vs. Dorsey*, 1 Md. Ch. 32, the Chancellor said: "It is certainly true that a warrant of resurvey does not authorize a party to include vacancy not contiguous to the tract or tracts to be resurveyed—and it is equally well established law of the land office that a person who has not a title to the land on which he obtains a warrant of resurvey does not, in virtue of such warrant, acquire a right of pre-emption in the adjoining vacancy—and yet the cases of *Hammond vs. Norris* and *Hammond vs. Warfield*, 2 H. & J. 140, 141 and 151, show that patents obtained from the land office by a party who has no legal title to the original, or upon a certificate of resurvey including vacancy not contiguous to the original, are nevertheless valid and available, unless some intervening right of a third party shall deprive them of their operation. These cases prove conclusively that such grants are not void, though obtained irregularly, and against the rules of the land office, and the case of *Hammond vs. Ridgely*, 5 H. & J. 263, shows that a grant is not void, though the surveyor includes land not within his county, if no fraud is practised, though upon caveat in the land office the grant would have been refused." In *Twiggs vs. Jacobs*, 4 Md. Ch. 541, the case in the text was approved. It was there held that the right to a warrant of resurvey only appertains to a party who has a fee simple interest in the original tract proposed to be resurveyed, and by parting with the title to such tract subsequent to the date of the warrant, the latter loses its effect as a warrant of resurvey. In *Gittings vs. Moale*, 21 Md. 135, it was held that a party must be seised in fee of land to entitle him to a warrant of resurvey: and under such warrant a patent will not be granted for lands, as vacancy, which are not contiguous. Cf. *Stallings vs. Ruby*, 27 Md. 149.

though the composition money was paid thereon, if J. H. for whom the same was made, had no estate in the original tract, and that upon the certificate being so vacated, the vacant land included therein, and also included by E. D. in his certificate, if compounded on in time, might legally be granted to E. D. and being so granted, that the plaintiff has no title under his grant to any part of the land so included in the grant to E. D. (a)

A deed for 86 acres of land, (being part of a tract,) without courses or distances, but referring to another deed, (not produced,) to ascertain the same, is not legal evidence to show title, or to support the location thereof on the plots, without producing the deed to which it refers. (b)

(a) Approved in *Armstrong vs. Percy*, 84 Md. 428, where it was held that after a patent has been granted, parol evidence is not admissible to contradict the certificate of survey, or to impeach its validity. But, while the matter is in *feri* such testimony is admissible. See note (e) *supra*.

(b) Affirmed in *Blessing vs. House*, 8 G. & J. 808; in *Clark vs. Bealmear*, 1 G. & J. 448, and in *Berry vs. Derwart*, 55 Md. 73. In the last named case the Court said: "It is perfectly well settled, both upon reason and authority, that every deed of conveyance, in order to transfer title, must, either in terms or by reference or other designation, give such description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty. Here, the deed not professing to convey all the property of the grantor or even all of his lots or real estate on Lee Street, there is really no description or designation of the five building lots on the one side or the other of Lee Street; and therefore it would be impossible to locate the lot claimed by the plaintiff, under the description contained in the deed. It is not a question of the sufficiency of the description of the property in the declaration, as seems to be supposed by the appellant, but of the sufficiency of the description in a muniment of title. There is in the margin of the schedule annexed to the deed of trust a reference to the mortgage to the Farmers Bank, as containing a full description of certain property, including the five building lots on Lee Street; and if the plaintiff had intended to rely upon that description in aid and support of the deed, the mortgage ought to have been offered in evidence with the deed; for the deed alone, unaided by any referential description, is not legal evidence to show title to the lot sued for, and is entirely without legal effect for that purpose."

The case in the text is approved in *Deery vs. Cray*, 10 Wallace, 271, where it was held that a deed which referred to a plat of the land for one of the lines of the boundary may be read in evidence to the jury without the production of the plat, subject to an identification of such line by competent evidence during the progress of the trial: that a deed which refers to such plat for one line, or which authorizes the line to be run by a certain person according to such a plat, is not void for uncertainty upon its face: and that in the face of such a deed made a great many years ago, though the plat is not produced, it is competent to show by other proof, written or parol, or both, that such a line existed and where it was located. The Court said: "In *Hammond vs. Norris*, the description in the deed was, 'all these two parcels of land, being parts of a tract of land called Wood's Enclosure, and sold to said John Howard by Joseph Wood, one parcel containing 86 acres, the other 94 acres, as by deed duly made and recorded in Frederick County appears.' The Court overruled plaintiff's objection, and permitted the deed to be read in evidence, but, as it subsequently appeared that there

Nor were certain facts and circumstances admissible to prove the location of the 86 acres, or to show title thereto, or that the deed referred to, or some bond or contract for conveying the 86 acres by metes and bounds, &c. as located on the plots, had ever been executed.

Where the plaintiff has made but one location on the plots of the beginning of the land for which the ejectment is brought, and that is counter-located, the jury cannot find a beginning for the plaintiff different from that located by him. (a)

The plaintiff must make such locations of the land upon the plots as will suit his case.

The jury cannot find a location of their own. but must find some one of the plaintiff's; if they find for him. (b)

If the beginning of a tract of land is lost or cannot be proved, then the beginning is to be found by reversing the lines of the tract from the first known and established boundary.

APPEAL from the General Court. The appellant brought an action of ejectment for a tract of land called Part of Wood's Inclosure lying in Frederick County, containing 2,286 acres. The defendant, (now appellee,) took defence on warrant under the general issue plea, and by his locations on the plots returned, defended himself under his title to a tract of land called Usher's Freehold, resurveyed for Thomas Usher on the 12th June, 1785, and granted to the defendant on the 2d of September, 1800. The cause was tried in the General Court at May Term, 1803.

1. The plaintiff having located on the plots a deed from John Howard to Philip Hammond, offered to read in evidence that deed, bearing date the 27th of September, 1753, being a deed of bargain and sale by way of mortgage, conveying unto Hammond "all those two parcels of land, being parts of a tract of land called Wood's Inclosure, and sold to the said John Howard by Joseph Wood, one parcel containing \* 86 acres, the other 94 acres, as by deed duly made, and recorded in the records of Frederick County, appears; the said two parcels of land being also what the said J. Howard's dwelling plantation is made upon; also all that tract of land called Chance, lying in Frederick County," &c. To the read-

was no such deed as that referred to on record in Frederick County, and as no other satisfactory proof was made of the location of these tracts within the larger tract of Wood's Enclosure, the Court finally held that it conveyed no title. That is just in accordance with the action of the Court in this case in admitting the deed to be read in evidence, subject to the effect of it as to title, when all the evidence should be in." In *Neel vs. Hughes*, 10 G. & J. 7, the Court said that every conveyance must either on its face, or by words of reference, give to the subject intended to be conveyed such a description as to identify it. If it be land, it must be such as to afford the means of locating it. Cf. *Tule-water, &c. vs. Archer*, 9 G. & J. 516; *Carmody vs. Brooks*, 40 Md. 246-8.

(a) See Rev. Code, Art. 64, secs. 22-27.

(b) See *Howard vs. Moale*, post m. p. 249.

ing of which deed the defendant's counsel objected, upon the ground that being a mortgage, the plaintiff must show how Howard became possessed of the land, or deduce his title; that although the deed is located on the plots, if it is a bad deed it cannot be read in evidence to prove a location.

CHASE, Ch. J. (DONE and SPRIGG, JJ. concurred.) The Court are of opinion, that if a paper or deed is located upon the plots, and not counter-located by the opposite party, the party, who so locates it, may read it to the jury, to show how it is located; but when the validity of the deed comes in question before the Court, if it is bad, the Court will direct the jury that it is a defective deed, and is to have no effect with them, but to be wholly disregarded.

The Court think the objection by the defendant's counsel is not a valid one, and that the deed may be read in evidence of the plaintiff's location of it on the plots. The defendant excepted.

2. The plaintiff then read to the jury the deed from J. Howard to P. Hammond, with the permission of the Court, (though objected to by the defendant,) as evidence that the deed was located upon the plots. It was admitted by the parties, that Wood's Lot and Wood's Inclosure are one and the same tract of land, and that there are two names for the same land. The defendant, to prove that J. Howard never had any interest or title in Wood's Lot or Wood's Inclosure, or in any part thereof, located upon the plots as beginning at a, offered to read in evidence the certificate of the clerk of Frederick County Court, under his seal of office, certifying, "that among the records of the said county, from the commencement of the said county up to the year 1775, there is no deed, bond of conveyance, or other instrument of writing, from Joseph Wood to John Howard, for or respecting the land called Wood's Lot, or Wood's Inclosure, except a deed for ninety-four acres."

\* The plaintiff's counsel objected to the certificate by the clerk of Frederick County Court being read in evidence, be- **132** cause, they contended, it was not the duty of the clerk to certify that there were no deeds remaining on record in his office; that his duty was to give exemplification of such as might appear on record. That the clerk ought to have been *subpoenaed*, if the party wished the benefit of the evidence offered, and examined him as a witness, whether he had searched for, and could not find such deeds.

CHASE, Ch. J. The Court are of opinion, that the certificate given by the clerk of Frederick County Court is illegal and incompetent evidence, and refuse to let it be read to the jury.

The clerk has no authority by law to certify a fact under the seal of the Court of which he is clerk. His duty is to grant exemplifications. The defendant excepted.

3. The defendant then offered in evidence, [a witness to prove the confession of J. Howard,] that the land called Part of Wood's Inclosure, included in the certificate thereof, made for J. Howard, and dated the 5th of March, 1753, under which the plaintiff claims title, never was actually surveyed under the warrant whereon that certificate is alleged to be founded; that the certificate was not made by Isaac Brooke, the deputy surveyor of Frederick County, or by any other person duly authorized to make the same, but that the same was made by J. Howard himself, by references altogether, without any actual survey.

CHASE, Ch. J. The Court refuse to let the defendant give the evidence offered, or any part thereof, to the jury. The defendant excepted.

4. The plaintiff, to make title to the land in the declaration of  
**133** ejection mentioned, read in evidence the warrant \* of resurvey which issued to John Howard, on the 6th of February, 1753, "to resurvey part of a tract of land called Wood's Inclosure, originally laid out for 86 acres, to amend all errors, and to add the contiguous vacancy," &c. Also the certificate of survey, dated the 5th of March, 1753, made in pursuance of the warrant of resurvey, stating, that "by virtue of a special warrant of resurvey granted to John Howard, to resurvey part of a certain tract of land called Wood's Inclosure, originally laid out for 86 acres, bearing date the 6th of February, 1753, to resurvey the said land, to amend all errors, and to add the contiguous vacancy," &c. The surveyor, Isaac Brooke, certified, that he had resurveyed the land, and found no error; that he had added a piece of contiguous vacancy containing 2,200 acres, "beginning at the original beginning, and running thence with the original N. 68° W. 54 ps. N. 19° W. 60 ps. then S. 8° W. 81 ps. S. 53° E. 48 ps. S. 52° W. 98 ps. N. 25° W. 38 ps. N. 23° W. 80 ps. N. 5° W. 106 ps. N. 36° E. 95 ps. to intersect the beginning of the N. 7° E. 130 ps. course of a tract of land called Howard's Range, and running with said courses N." &c. &c. "containing 2,286 acres of land." Also the assignment of Howard to Philip Hammond, on the 29th of November, 1753, annexed to the certificate of survey, whereby Howard assigned to Hammond "the certificate returned on a certain resurvey had and made upon 86 acres of land, being part of a tract of land called Wood's Inclosure, originally taken up by Joseph Wood, together with all his (the said Howard's,) right, &c. of and in the said certificate and the land, which by resurvey contains 2,286 acres," &c. Also that the certificate was examined and passed on the 6th of March, 1754; the composition money paid on the 7th of March, 1754, and the quit rents paid up to the 7th of June, 1771, amounting to £80 5 0. Also other indorsements on the certificate, showing that it was on the 30th of January, 1772, caveated by Philip, Rezin, and Matthias Hammond; on the 16th of March, 1772, caveated by

Edward Dorsey, of John; on the 29th of October, 1772, caveated by Thomas Dorsey; that the caveats were dismissed by the Act of April Session, 1782; that there was an entry in the margin of the book, in which the warrant was entered, that a caveat had been entered by Greenbury Ridgely, and others, in 1754, and which had not been noticed when the other caveats were entered dismissed, and a list thereof forwarded by the \* register of the land office; that the last mentioned caveat of Greenbury Ridgely **134** was withdrawn by Richard Ridgely, his son and heir at law, and that patent had issued on the 9th of September, 1796, to Philip Rezin, and Charles Hammond, and Richard Hopkins, and Hannah his wife. Also the last will and testament of Philip Hammond, (the elder,) dated the 6th of June, 1753, wherein it does not appear that the land called Part of Wood's Inclosure is mentioned, but by his will "all the rest and residue of the real and personal estate" of the testator, is devised to his six sons, Charles, John, Philip, Denton, Rezin and Matthias, to be equally divided between them, and their heirs, as tenants in common. The plaintiff also offered in evidence, that P. Hammond, the testator, died some time in the year 1760, and that Charles Hammond was his eldest son and heir at law, to whom the title which P. Hammond, the father, had in the land, descended, and who became entitled to all the interest his father had therein (a). The plaintiff then deduced a regular title from C. Hammond, down to the lessors of the plaintiff. Also that the tract of land for which this suit is brought, as well as the several tracts or parcels of land described in the grants and deeds aforesaid, are truly located by the plaintiff on the plots. The defendant then offered evidence to prove, that there was no tract of land in the County of Frederick patented by the name of Wood's Inclosure, or so called in the certificate for the same; that a tract of land situate in Frederick County, was on the 10th of January, 1748-9, resurveyed for Joseph Wood, by virtue of a warrant of resurvey dated the 28th of July, 1748, and patented to him, the 1st of June, 1750, for 1,540 acres, and called in the certificate and patent thereof, Wood's Lot; that this land did afterwards acquire, in the neighborhood where it lay, the name also of Wood's Inclosure; that a tract of land contiguous thereto, surveyed on the 12th of November, 1752, called The Request, and located upon the plots, did actually begin at the end of the 19th line of Wood's Lot, but in the certificate thereof, calls to begin at the end of the 19th line of Wood's Inclosure; that several mesne conveyances, \* for parts of Wood's Lot, executed by the proprietors thereof between the years 1754 and 1759, call **135**

(a) The counsel for the plaintiff, in this part of the statement, which they had drawn up, stated, that C. Hammond had become "seized *prout lex postulat*," to which the counsel for the defendant objected. The Court said these expressions were only proper where a legal title descends—In this case an equitable title only descended to C. Hammond.

and describe the land by the name of Wood's Inclosure. The defendant then read in evidence the patent to Joseph Wood, dated the 25th of March, 1747, for the land called Wood's Lot, containing 126 acres, and granted to him for so much land due him by virtue of a warrant for that quantity granted him the 18th of February, 1746, which tract is stated to lie in Prince George's County, and beginning at a bounded oak standing on the E. side of a small branch, &c. agreeably to a certificate dated the 25th of March, 1747. The defendant then offered evidence to prove, that Wood's Lot is truly located upon the plots, as beginning at A, and described by black lines from No. 1 to No. 43, black figures. Also that J. Howard never had any interest in, or title to, any part of Wood's Lot, or Wood's Inclosure, either in law or in equity; except as to 94 acres part thereof, which 94 acres are truly located on the plots; and to prove this, the defendant offered the evidence of the clerk of Frederick County Court, the keeper of the land records of that county, to prove, that among the records of the county, from the commencement of the county up to the year 1775, there is no record of any deed, bond of conveyance, or other instrument of writing, from Joseph Wood to J. Howard for or respecting Wood's Lot or Wood's Inclosure, except the deed for the 94 acres above stated. Also the evidence of the clerk of the General Court for the Western Shore, that among the records in his office there is no record of any deed, bond of conveyance, or instrument of writing of any kind, from J. Wood to J. Howard, respecting Wood's Lot or Wood's Inclosure, the plaintiff having on the trial produced no such deed, bond of conveyance, or instrument of writing, or any copy thereof. Also that J. Howard, or any person claiming from or under him, never were seized or possessed of any part or parcel of Wood's Lot or Wood's Inclosure, except the before mentioned 94 acres. Also that the 86 acres of land located by the plaintiff upon the plots, as the original upon which the resurvey called Part of Wood's Inclosure is pretended to have been made, was always, from the taking up thereof, to wit, from the 10th of January, 1748, till the year 1780, in the possession, occupation, and actual user of J. Wood, the patentee, by actual inclosure of part, and by cutting and using \* the wood land as

**136** to the residue, and during all that time never was, in the whole, or in part, in the possession of J. Howard, or of any person claiming under him. Also, that from the 1st of January, 1780, down to this time, the said lands have been, and still are, in the like possession and occupation of the defendant in this cause, claiming under J. Wood, and not under any title derived through or from J. Howard. The defendant then read in evidence a deed from Joseph Wood to Edward Dorsey, for part of Wood's Lot or Wood's Inclosure, dated the 20th of June, 1754, and reciting, that on the 21st of June, 1750, Wood had conveyed to Dorsey part of Wood's Inclosure, containing 584 acres; that the parties had discovered that patent had



issued to Wood for the land, by the name of Wood's Lot, although commonly called and known by the name of Wood's Inclosure. This deed was therefore to confirm the title, &c. Which land is truly described on the plots as beginning at red B, and described by yellow lines. That on the 22d of August, 1757, E. Dorsey obtained a *special warrant* to resurvey the part of Wood's Lot so conveyed to him, which warrant stated that he was seized in fee of and in 584 acres of land, part of Wood's Lot, lying in Frederick County, originally, on the 1st of June, 1750, granted by patent of confirmation to Joseph Wood for 1,540 acres, contiguous to which he had discovered some vacant land, and being desirous to add the same, prayed a special warrant to resurvey his part of the said tract—warrant was therefore granted to him, &c. Also a certificate made for E. Dorsey, bearing date the 18th February, 1758, in virtue of the said warrant, by which certificate it appears that the said part so resurveyed for Dorsey, contained only 564 acres; that 336 acres of vacant land were added, and called The Resurvey on Part of Wood's Lot, containing 900 acres. Also a patent to E. Dorsey for the same land, bearing date the 18th of February, 1758. Also that E. Dorsey, the patentee, died previous to the 16th of October, 1760, and that the lands descended to his heir at law Thomas Dorsey. Also that the land so granted to E. Dorsey is truly located on the plots beginning at B, and described on the plots by blue lines from 1 to 38, red figures, marked at the end of each line with red P. W. L. Also that E. Dorsey, the patentee, and those claiming under him, held, used and enjoyed, The Resurvey on Part of \* Wood's Lot, from the date of the certificate thereof, under the aforesaid title, down **137** to the bringing of this ejectment, part of it in cultivation and under actual enclosure, and part being in woods uninclosed, by cutting, using wood on and therefrom; and that J. Howard, or any person under him, never did use, occupy, possess, or in any way enjoy, any part of the lands included in the resurvey called The Resurvey on Part of Wood's Lot, or any part of the lands included within the lines of the resurvey called Part of Wood's Inclosure. The parties in this cause, by consent, examined John Callahan, Esquire, the register of the land office for the Western Shore, who deposed, that according to the law, practice, and usages of the land office, prior to the year 1753, and ever since, no person was entitled to a patent on a certificate returned on a warrant of resurvey, unless such person was seized of an estate of freehold in the original whereon the resurvey was made. That by the law, practice and usages aforesaid, from the time aforesaid, if the person so having returned a certificate, and had by the same included vacancy, and had paid to the officer, entitled to receive it, the full amount of caution money for the vacancy added, and the land was, after that payment, included in a subsequent certificate on which the caution money was fully paid, although subsequent to the payment of the first caution money.

that in such case, if the prior certificate was caveated in the land office, and it was proved and made appear to the Judges of the land office, that neither the person for whom the prior certificate was made, nor any one claiming the certificate, had any legal estate or seizin in the original on which the certificate of the resurvey was made, that then the prior certificate would be, and ought by the said law, practice and usages, to be vacated, and a patent ought to issue on the second or subsequent certificate, if that certificate was not in other respects liable to objection; and that upon so vacating the first certificate, the party claiming the same would be entitled to as much land warrant as would amount to the sum of money so paid for caution money. Mr. Callahan, upon cross-examination, deposed that he has been in the land office, except fifteen or eighteen months, upwards of thirty-four years; that he came into that office in the year 1767. He knows of no Proprietary instructions given, that a person taking out a warrant of \* resurvey

**138** on lands of which he was not seized in fee, and in virtue of that warrant including vacant land and compounding for the same, which prevented such person from having a patent for such vacant land. But that it was the understanding and practice of the office, in his time, that such patent would not be allowed. He knows of no usage or instance, in which a caveat has been heard and determined unless the caveator did show an interest in the lands at the time. He does not know any instance in which the caveat has prevailed unless the caveator had an interest in the land caveated. He knows of no instance in which a certificate made in pursuance of a warrant of resurvey, after composition money paid, by a person not seized of the original, has been caveated and vacated by a person not having an interest at the time when the money was paid, but has understood that any lands taken by a common warrant, special warrant or warrant of resurvey, would prevail against such certificate, but he cannot refer to any particular case. According to his understanding and recollection, the payment of the caution money was not made a question where the party obtaining the certificate had no original; but that where a certificate of junior date, regularly made and compounded on, including the same land, though made after the payment of the caution money upon the elder, prevailed. He has no recollection of any particular case, but he always understood the payment of composition money under such circumstances was an unimportant circumstance. He does not recollect any case where a person has entered a caveat alleging himself seized of the original, on which the warrant of resurvey issued to another person. Interrogatories were put to Mr. Callahan by the plaintiff and defendant, to which he answered in the matter set forth in *Kilty's Land Holders' Assistant*, 456, 457, and 458.

The plaintiff then offered in evidence that the said Callahan, entered into the land office, as a clerk, in the year 1767, that at that

time William Steuart was the chief clerk, and so continued till the year 1774, when David Steuart succeeded him and continued to hold that office until 1777; that Saint George Peale was appointed register of that office the 21st of April, 1777, and so continued till the year 1779, when the said Callahan was appointed; and that during the time William Steuart was the chief clerk, \* Saint George Peale was principal acting clerk under him, and also under David Steuart, both of whom had several other clerks in that office. And the parties, by consent, also examined the Honorable ALEXANDER CONTEE HANSON, Chancellor of the State, and Judge of the land office, who deposed and answered the several questions propounded by the counsel of the parties as they are set forth in *Kilty's Land Holders' Assistant*, 445 to 456, 460 to 465. Which evidence was delivered by the register of the land office for the Western Shore, and by the Judge of that office, in open Court, and reduced to writing by them respectively; and the testimony by them so respectively given was, by consent of the parties, agreed to be received, to operate so far as the same is legal and proper. The plaintiff also read in evidence certain Proprietary regulations or instructions. [Which see in *Kilty's Land Holders' Assistant*.] The defendant then offered to prove, that the certificate for Part of Wood's Inclosure had never been returned into the land office, until after E. Dorsey had obtained his patent for The Resurvey on Part of Wood's Lot, to wit, till after the 18th of February, 1758; that E. Dorsey, and those claiming under him, have regularly paid the quit rents upon the whole of The Resurvey on Part of Wood's Lot, from the 18th of February, 1758, to the commencement of the revolutionary war between the United States and Great Britain, and have ever since paid the public taxes and county levies and dues thereon. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that the patent which issued on the 9th of September, 1796, to Philip Rezin, and Charles Hammond, and Richard Hopkins, and Hannah his wife, will, by relation to the date of the certificate of survey, be effectual to pass a title to all the vacant land included therein, notwithstanding John Howard had no right or estate of, in and to, the eighty-six acres of land on which the warrant issued, and notwithstanding the same may have been included in Edward Dorsey's resurvey aforesaid.

*Martin*, (Attorney-General,) *Key and Johnson*, for the plaintiff, cited 18 *Vin. Ab. tit. Relation*, 289, 290; *Garretson's Lessee vs. Cole*, 2 H. & McH. 459; *Howard's Lessee vs. Cromwell*, 1 H. & J. 115; *Gibson's Lessee vs. Smith*, *Ibid.* 253; *Lloyd vs. Gordon*, 2 H. & McH. 254.

\* *Shaaff, Mason and Harper*, for the defendant, cited *Co. Litt.* 150 a; *Ringgold's Lessee vs. Malott*, 1 H. & J. 299; 3 *Coke*, 140 28, 29, 30; *Anon.* 3 *Atk.* 314; *Townsend vs. Ash*, *Ibid.* 340; 2 *Shep. Ab.* (3d part. 149, 150, 151, 152; *Bladen's Lessee vs. Cockey*, 1 H. & McH. 234; 3 *Lev.* 285; 2 *Vent.* 89, 200; *Cro. Jac.* 512; 10 *Coke*, 49;

*Hath's Lessee* vs. *Polk*, 1 H. & McH. 363; 3 Blk. Com. 43; 2 Roll. Rep. 502; *Jenk.* 428; 18 Vin. Ab. tit. *Relation*, 290, pl. 8; *Selwin* vs. *Selwin*, 2 Burr. 1134; S. C. 1 W. Blk. Rep. 222, 223; *Roe* vs. *Griffits*, 4 Burr. 1962; *Doe* vs. *Roe*, *Ibid.* 1971; 2 Roll. Ab. 399; *Garretson* vs. *Cole*, 1 H. & J. 370; *Beall's Lessee* vs. *Beall*, *Ibid.* 347; *Peter's Lessee* vs. *Mains*, 4 H. & McH. 423; *Cheney* vs. *Ringgold's Lessee*, (*ante* 87;) *West's Lessee* vs. *Hughes*, 1 H. & J. 13; *Lloyd* vs. *Tilghman*, 1 H. & McH. 85.

CHASE, Ch. J. In deciding the question before the Court, it will be necessary to consider the efficient qualities of the different kinds of warrants which are used to take up vacant land, cultivated or uncultivated.

A common warrant may be located on any uncultivated land in the county, to the surveyor of which the warrant is directed, if no person has acquired a right of pre-emption to such vacant land.

A special warrant is used to affect cultivated land, in which the location and the quantity of acres are designated, and the party pays the composition money at or before the time of granting the warrant, for the number of acres so directed. The survey is then made within the usual time of six months, for ascertaining with more exactitude and precision the land thus affected. If on the survey being made it appears to the party that he has not as much land as he paid for, he can apply the surplus of his warrant to affect any vacant land, which a common warrant is competent to take, whether it lies in contiguity or detached from the land so located in his warrant.

A warrant of resurvey is taken out for the purpose of resurveying a tract or parcel of land in which the party has a fee simple. In virtue of such warrant, the party acquires a right of pre-emption in all the adjoining vacancy, and if he makes his survey, and pays the caution money within two years from the date of his warrant, he has a complete equitable interest in all the vacancy included in his survey.

\* The question for decision now occurs, can a person, who  
**141** takes out a warrant of resurvey without having a title to the land to be resurveyed, acquire a title in the vacant land taken up and included in such resurvey?

The Court are of opinion, that such warrant will operate as a common warrant, and affect any vacant land which a common warrant was competent to affect; and that, if the jury find the facts as stated, that an equitable interest vested in John Howard on the 7th of March, 1754, when the composition money was paid, in all the vacancy included in his resurvey, and that the patent obtained in 1796, and granted to Charles, Philip, and Rezin Hammond, and Hannah Hopkins, wife of Richard Hopkins, will operate by relation to the date of the certificate of resurvey, if it appears to the jury

that the certificate was returned to the land office previous to the time when Edward Dorsey obtained his grant, which is stated to be on the 18th of February, 1758. That, in the opinion of the Court, unless that fact is found by the jury, Edward Dorsey was a fair purchaser without notice of the equitable interest of John Howard, and the grant of Edward Dorsey cannot be over-reached or defeated by relation. The defendant excepted.

5. The defendant then prayed the Court for their opinion and direction to the jury, that if they were satisfied from the evidence, that by the rules and regulations of the land office in the year 1753, and since, the certificate of resurvey, under which the plaintiff now claims, was liable and subject to be vacated upon a caveat, notwithstanding the payment of the composition money thereon, if J. Howard, for whom the same was made, had no estate or seisin in the original tract, so resurveyed, and that upon the certificate being so vacated, the vacant land so included therein, and also included by E. Dorsey in his certificate of resurvey called The Resurvey on Part of Wood's Lot, as above stated, if the last certificate was compounded on in time, and in all other respects conformed to the rules and regulations of the land office, might legally, properly and regularly, be granted to E. Dorsey, and being so granted, that the plaintiff had no title under the grant for Part of Wood's Inclosure to any part of the land so included within the patent to E. Dorsey for the Resurvey on Part of Wood's Lot.

\* CHASE, Ch. J. The Court cannot give the opinion and direction prayed for. The defendant excepted. **142**

6. The plaintiff then gave in evidence the patent of Wood's Lot, granted to Joseph Wood on the 25th of March, 1747, for 126 acres of land. Also a resurvey made thereon by Wood, and the patent granted to him on the 1st of June, 1750, for 1,540 acres of land, and called Wood's Lot; and that the same lands were truly located on the plots. Also, that the resurvey called Wood's Lot, was known in the neighborhood by the name of Wood's Inclosure, and that Wood's Lot, the resurvey, and Wood's Inclosure, were one and the same tract of land. Also a certificate of resurvey made by J. Howard of Part of Wood's Inclosure, surveyed on the 5th of March, 1753. He then deduced the title to the said land down to the lessors of the plaintiff. He then offered in evidence the deed, dated the 21st of June 1750, from J. Wood to J. Howard, for 94 acres of land, being part of Wood's Lot, and called Wood's Inclosure; and that the same is truly located by him on the plots. Also a deed from J. Wood to E. Dorsey for a part of Wood's Lot, dated the 20th of June, 1754; and that the same is truly located by him on the plots. He then produced, and offered to read in evidence, the deed from J. Howard to P. Hammond, dated the 27th of September, 1753, herein before mentioned in the first bill of exceptions; and showed, that the 86

acres of land therein mentioned, were located by him on the plots beginning at the end of the 27th line of Wood's Lot, as located by him at black *a*, and running, &c. to the beginning; and to prove that to be the true location thereof, he offered to give in evidence the deed, and the resurvey made by E. Dorsey on the 18th of February, 1758, on the land so conveyed by J. Wood to Dorsey, and called The Resurvey on Part of Wood's Lot; and that the resurvey is truly located by him on the plots; and that the 35th line of that resurvey strikes the end of the third line of the 86 acres, and then runs three lines thereof reversed to the beginning of the 86 acres, and thence to its beginning at black B, excluding the 86 acres. He further offered to prove, that after the death of E. Dorsey, the land contained in the last mentioned resurvey and patent descended to T.

Dorsey his heir. Also that the devisees of P. Hammond, \* the **143** assignee, claimed the land contained in the certificate, so assigned as personal property, and that C. Hammond, his heir, claimed the same as land not devised by the will. Also, that a caveat was entered by the devisees against the issuing of a patent to C. Hammond on the certificate, and which caveat was endorsed and noted on the certificate on the 30th of January, 1772. He also offered in evidence, a deed dated the 17th of November, 1779, from Philp and Rezin, two of the devisees, to Matthias Hammond, one other of the devisees, for their interest in the two tracts mentioned in the deed from J. Howard to P. Hammond, their father, and in which the 86 acres are described by the following metes and bounds, to wit: "Beginning at the end of the 27th course of the land called Wood's Inclosure, and running," &c. and that the same are the beginning, courses, metes and bounds, by which the plaintiff hath located the 86 acres on the plots. Also a deed dated the 17th of November, 1779, from M. Hammond to B. Warfield, conveying all his right and interest to the two parcels of land mentioned in the deed from J. Howard to P. Hammond to be conveyed, and in that deed the 86 acres of land are described as contained within the same metes and bounds and beginning at the same place. And that Warfield did, in consequence of that deed, enter upon and possess the parcels of land therein mentioned, and that afterwards, in the year 1790, he sold his interest and right in the two parcels of land to T. Dorsey. and gave up the two parcels of land to T. Dorsey. Also an original deed, dated the 14th of March, 1772, from C. Hammond, heir at law of P. Hammond, to his brother J. Hammond, one of the devisees, for his interest and estate in the two parcels of land. And that J. Hammond, in his life-time, sold all his interest in the two parcels of land to T. Dorsey; that both C. & J. Hammond departed this life antecedent to the 22d of June, 1784, and that W. Hammond was the son and heir of J. Hammond; and that on the 22d of June, 1784, W. Hammond, in consideration of the payment to him by T. Dorsey of the sum of £23 7 6, the balance of the purchase money then due from

T. Dorsey, under the sale by his father, did execute a deed to T. Dorsey, conveying to him all his right and interest in the two parcels of land. And that T. Dorsey, so being entitled, as heir \* at law, to the lands contained in the resurvey made by E. Dorsey, and having so purchased the two parcels of land mentioned in the deed from J. Howard to the first mentioned P. Hammond, afterwards, on the 27th of September, 1784, entered into a contract in writing, under seal, with Thomas Usher, for the sale of certain lands, and among others, the 86 acres, and that the 86 acres in that contract are described as being purchased by P. Hammond, in his lifetime, on the 9th of November, 1751, of a certain J. Howard, and as having been bought by T. Dorsey of the devisees of P. Hammond, and as having been sold by J. Howard to P. Hammond, and purchased by T. Dorsey; and having proved the execution of the contract, offered to read the same in evidence. He also offered to give in evidence a deed from T. Dorsey to T. Usher, dated the 12th of February, 1785, for the several tracts of lands in the contract mentioned; and that the courses, lines and metes, mentioned in the deed, are truly located on the plots by the plaintiff, and do include the whole of the 86 acres as located by the plaintiff, and that one line thereof strikes the second line of the 86 acres, as located by the plaintiff, and runs thence to the end thereof, then with the 3d, 4th, 5th, and 6th lines of the plaintiffs' location of the 86 acres, and then with the given line, to its beginning at black a, and thence to black B, the beginning of the deed; and that in the deed there was a covenant of warranty as to the parts of the resurvey on Wood's Lot contained in the said deed, against T. Dorsey, his heirs and assigns, and against J. Howard, and his heirs and assigns only. Also a deed from T. Dorsey to T. Usher, dated the 27th of May, 1785, for the same lands, describing them in the same manner, but containing a general warranty. And that T. Usher did, by virtue of the deeds to him, enter into and take possession of the lands so conveyed by T. Dorsey, and among other parts thereof, of the 86 acres so sold to him by T. Dorsey, and so located, and made a resurvey thereon, and returned a certificate of resurvey, dated the 12th of June, 1785, called Usher's Freehold, and that the same is truly located on the plots by the plaintiff; and that the lines thereof include the whole of the 86 acres, striking the same at the same place, and running with it in the same manner as the deed from T. Dorsey to T. Usher, and that T. Usher was possessed of the land \* so contained in his certificate, until his death, which happened about January, 1786. That T. Usher, by his will appointed T. U., S. J., J. U., & J. D., executors thereof, and did devise, direct, and empower them, or the survivors or survivor of them, to make sale of all and every part of his real estate, and to execute deeds for the same, to the purchasers thereof, in fee simple; and that the executors did take upon themselves the execution of the will, and obtained, in due form of law, letters testa-

mentary. That after the death of T. Usher, one John Salmon filed a bill in the Court of chancery against the devisees and executors of T. Usher, to compel a sale of his real estate for the payment of his debts; that it was so proceeded in that suit, that a decree was made for the sale thereof and that by virtue of that decree, the said lands were sold to divers persons, as stated in a report thereof returned to the Court of chancery, and by the chancellor approved, ratified and confirmed. That the part of the land located by the defendant as his defence, was purchased by Catherine Usher, widow of T. Usher, and by her sold to the defendant, who entered into and possessed the same under that sale. That it was agreed that the patent upon the certificate so returned by T. Usher should, for convenience, be granted to the defendant, and that he should then convey to the several purchasers under the decree, the respective parts respectively by them purchased; that the patent was so issued, and conveyance so made, and that the respective purchasers of the land, so contained in the certificate returned by T. Usher, did enter upon and possess the parts thereof by them respectively purchased, by virtue of the title of T. Usher, and the sales under the decree. And that after the death of T. Usher, his executors claimed the whole land contained in the certificate, so by him returned, under his title. Also a deed from Joseph Wood, the patentee, to Jonathan Wood, his son, but not his heir at law, dated the 4th of March, 1780, for "all that tract or parcel of land, being part of a tract called The Resurvey on Wood's Lot, beginning at the end of the 27th line of the said resurvey on Wood's Lot, and running," &c. "Containing 153 acres of land," &c. And that the 153 acres included the 86 acres of land mentioned in the deed from J. Howard to P. Hammond, and are the same 86 acres of land mentioned in the deed from J. Howard to P. Hammond, and are the same 86 acres of land located by the plaintiff as the 86 acres sold to T. \* Usher by T. Dorsey.

**146** Also a deed, dated 9th May, 1786, by Jonathan Wood, executed in due form of law, to the executors of T. Usher, to confirm their title to the 86 acres, in which it is expressed "that doubts had arisen in regard to the title of 86 acres, part of a tract of land sold by T. Dorsey to the said T. Usher," and that in consequence Jonathan Wood conveyed to the executors of T. Usher, all his right and title to the 86 acres, to begin at the end of the 27th course of Wood's Inclosure, and running thence; &c. That the courses and beginning, so described by the heir of Joseph Wood, under whom J. Howard claimed the 86 acres, are exactly correspondent with the location of the 86 acres made on the plots by the plaintiff. That before and at the time when the said deed was executed, the executors were possessed of the 86 acres, according to the location under the title of T. Usher, and that the 86 acres were the same 86 acres mentioned in the deed from J. Howard to P. Hammond, and which had thus been conveyed to P. Hammond, and which had thus been conveyed to



Warfield, and to T. Dorsey, and on which J. Howard made his resurvey; and that no person whatever has had any possession of the 86 acres, located as the plaintiff hath located the same, except J. Howard, and those claiming from and under him. Evidence was then offered, that no deed could be found on record from Joseph Wood to J. Howard for the 86 acres.

*Mason, Shaaff, and Harper*, for the defendant objected to the reading of the deed from J. Howard to P. Hammond, dated the 27th of September, 1753, to prove the location of the 86 acres. They cited *Co. Litt.* 352 b; 3 *Com. Dig.* (E. 4.) 274.

*Martin*, (Attorney-General,) *Key* and *Johnson*, *contra*, cited *Gitting's Lessee vs. Hall*, 1 H. & J. 14; *The Earl of Sussex vs. Temple et al.* 1 *Ld. Raym.* 311; and *Gilb. L. E.* 100.

CHASE, Ch. J. The deed from J. Howard to P. Hammond of the 27th of September, 1753, does not sufficiently specify the land, being for 86 acres, and 94 acres, parts of Wood's Inclosure, "conveyed by Joseph Wood to John Howard, as appears by deed recorded in Frederick County," but the deed thus referred to cannot be found. This \* deed does not define the 86 acres by any courses or distances, there is, therefore, nothing in it whereby any locatable land can be conveyed, and of course passes nothing, and passing nothing it cannot be evidence. Nothing but the deed itself can prove the location of the land recited in the deed now offered to be read to the jury. The Court are therefore of opinion, that the deed from J. Howard to P. Hammond is not legal evidence to show title in Hammond in the 86 acres of land, part of Wood's Inclosure, as located on the plots by the plaintiff, or to support his location of the same, without producing the deed from Joseph Wood to J. Howard, to which the deed from J. Howard to Hammond doth refer, to ascertain and identify the 86 acres intended to pass by the same; and that the deed is inoperative to pass the same, without producing that deed. The Court refuse therefore to suffer the same to be read to the jury. 147

The Court are also of opinion, that the facts and circumstances, stated by the plaintiff, are inadmissible to prove the location of the 86 acres, and the Court refuse to suffer the same to be read to the jury for that purpose, or to show title in P. Hammond in the 86 acres of land. The plaintiff excepted.

7. The plaintiff then, in order further to prove that J. Wood did execute to J. Howard some conveyance for the 86 acres of land, or some bond or contract for the conveying to Howard the 86 acres, by the same metes and bounds, beginning as located by the plaintiff, offered to give in evidence the deed from Howard to P. Hammond, and the resurvey made by E. Dorsey on the 18th of February,

1758, on the land so conveyed by Wood to Dorsey, and that the resurvey is truly located, &c.

CHASE, Ch. J. delivered the same opinion as that given on the prayer in the preceding bill of exceptions, and then proceeded as follows: The Court are also of opinion, that the facts and circumstances, stated by the plaintiff, are inadmissible to prove, that Joseph Wood did execute to John Howard a conveyance for the 86 acres of land, or a bond, or contract, for the conveying to Howard the 86 acres by the same metes and bounds, and beginning as located by the plaintiff; and do accordingly refuse to allow \* the same  
**148** to be given in evidence to the jury. The plaintiff excepted.

8. The plaintiff then prayed the opinion and direction of the Court to the jury, that unless they are satisfied, from the evidence, of the true position of the beginning of the 86 acres of land, on which the resurvey called Part of Wood's Inclosure was made, or the beginning of that resurvey, and for which land this suit is brought, that then they have a right, and are bound by law, to ascertain a place of beginning, by reversing the first nine courses of that resurvey without variation, or with such variation as they think right, from the place marked *a* on the plots, at red figures 27, and red P W L, and that unless they are satisfied, from the evidence, of the place where the 104th line of the resurvey calls for, that then the true location of the land is to be ascertained by running the lines of the resurvey from the place marked on the plots at *q*, without or with such variation as they think proper, until the given line shall intersect and close with the beginning so found by reversing as aforesaid. And that the jury are by law competent to draw lines on the plots, to ascertain the true position of the land in the declaration mentioned, or to make such description thereof in their verdict, as shall fix the true position of the same, notwithstanding there are no such lines on the plots at this time located. And in case they have evidence, to satisfy their minds, of the true original beginning of the resurvey made by Wood, and for which this suit is brought, and that the same is at a place different from what is located by either the plaintiff or the defendant, that then they are to begin at the place so proved, and run the first eight courses of the grant, without or with such variation, as they think most proper, to correspond with original location; and that the ninth course must be run to its call at *a*, red 27, red P. W. L.; and in case they have not evidence to establish the place called for at the termination of the 104th line, that then they have a right and are bound, to locate the lines from *q*, with or without variation, as they think proper, until the given line shall intersect and close with the place of beginning. And that the jury are by law competent to draw lines on the plots to ascertain the true  
**149** position of the land, or to make such description thereof in their verdict \* as shall fix the true position of the land, not-

withstanding there are no such lines on the plots at this time located. And on fixing such location the plaintiff is entitled to their verdict for all such land as is included within their finding, and which is also contained in the location of the plaintiff of Part of Wood's Inclosure, and for which the defendant hath taken defence.

*Martin*, (Attorney-General,) and *Key*, for the plaintiff, cited the Act of November, 1781, ch. 20, s. 14, and *Carroll et al. Lessee vs. E. & S. Norwood*, 1 H. & J. 167.

*Shaaff*, for the defendant, cited *Kilpatrick's Lessee vs. Kyger*, 1 H. & J. 298, and *Webb's Lessee vs. Beard*, *Ibid*, 349.

CHASE, Ch. J. The Court cannot give the direction prayed on the part of the plaintiff, inasmuch as the plaintiff has not made any location on the plots to warrant the Court in directing the jury to find a beginning for the plaintiff, different from that located at the letter G, as the beginning of Part of Wood's Inclosure, the plaintiff having made only one location of the beginning of that tract of land, and the same having been counter-located by the defendant.

The Chief Judge said, that the plaintiff must make such locations as will suit his case. He has made two from the same beginning, one of which the jury must find, if they find for the plaintiff. It is customary, in order to meet the variation of the compass, to make sundry locations, so as to have one which the jury may find. The plaintiff relies upon his locations; and the jury cannot find a location of their own, but must find some one of the locations made by the plaintiff, if they find for the plaintiff. The plaintiff excepted.

On motion of the plaintiff's counsel, leave was given by the Court to withdraw a juror for the purpose of amending the plots; but the plots were amended by consent of the parties without withdrawing a juror, and the trial continued.

9. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if the beginning of J. Howard's resurvey is lost, or cannot be proved, then the beginning of the same is to be found by reversing the lines from the first known and established boundary; and \* that the holders under that resurvey are entitled to all the land within that resurvey located from such beginning so **150** found, unless taken away by elder surveys.

THE COURT gave the direction to the jury as prayed.

Verdict and judgment for the defendant, and the plaintiff appealed to this Court.

The cause was argued at the last term before TILGHMAN, NICHOLSON, and GANTT, JJ. upon the bills of exceptions taken by the plaintiff in the Court below, being the 6th, 7th, and 8th, as hereinbefore stated and numbered.

*Key and Johnson* (Attorney-General,) for the appellant, in their arguments stated, that under the sixth and seventh bills of exceptions two questions occurred:— 1. Whether Howard had title to the 86 acres of land upon which his resurvey was made? And 2. Whether sufficient evidence was offered to the jury to establish the location of the 86 acres on the plots? They contended that there was sufficient evidence for the Court to direct the jury to presume a deed from Wood to Howard. At all events that the evidence ought to have been suffered to go to the jury for them to judge whether or not such a deed had ever been executed. They cited *Gilb. L. E.* 98; *Gittings' Lessee vs. Hall*, 1 H. & J. 14.

On the eighth bill of exceptions they contended, that the jury had a right to draw lines on the plots, or in any other manner they might think proper, in order to find the beginning of the land in controversy, although the beginning so found might be at a different place from that located on the plots by either of the parties. They cited *Darnall's Lessee vs. Goodwin*, 1 H. & J. 282; *Carroll et al. Lessee vs. Norwood*, *Ibid*, 186.

*Shaaft and Harper*, for the appellee, in their arguments on the sixth and seventh bills of exceptions, cited *Vaugh.* 74; *Gilb. L. E.* 99; *Morris' Lessee vs. Vanderen*, 1 Dall. Rep. 67; *Com. Dig. tit. Evidence*, (B. 5;) *Smith vs. The Vestry, &c.* in this Court on the E. S.

On the eighth bill of exceptions they insisted that the plaintiff could not give evidence that the beginning of the land, for which he brought his ejectment, was at a different place than that claimed by his locations on the plots. \* They cited *Kirkpatrick's Lessee* **151** vs. *Kyger*, 1 H. & J. 289; *Webb's Lessee vs. Beard*, *Ibid*, 349; *Hughes's Lessee vs. Howard*, decided in Baltimore County Court, and now on appeal in this Court. *Curia adv. rult.*

THE COURT, at this term, decided that there was no error in the opinions given by the General Court in either of the bills of exceptions taken on the part of the plaintiff below.

NICHOLSON, J. concurred, except as to the opinion given in the eighth bill of exceptions, and from that opinion he dissented.

*Judgment affirmed.*

#### HAMMOND et al. Lessee vs. WARFIELD.

The Courts will take notice of the rules of the land office as forming regulations relative to property, and will direct the jury as to the law arising from such rules. (a)

The rules of the land office cannot be proved by witnesses; they are to be found on the records of that office, and in the proclamations of the proprietary.

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(a) Approved in *Stallings vs. Ruby*, 27 Md. 155.

The usage and practice of the land office must be proved by the adjudications of the Judges of that office, and not by the opinions of witnesses as to what was that usage and practice.

Where a warrant of resurvey, taken out by J. H. who was not seized of the original tract resurveyed, was located on vacant land not contiguous to such original tract, his grant therefor will operate by relation to the date of the certificate of resurvey, if the composition money was paid in time, and the certificate of resurvey was returned to and in the land office, when a warrant of resurvey issued to J. C. to affect the vacant land included in J. H.'s certificate; or if the composition money was not paid in time by J. C. on his resurvey, and J. H.'s certificate was in the office when J. C. did compound, the grant to J. H. will relate to the date of the certificate. (a)

But if J. H.'s certificate was not in the office when the warrant issued to J. C. and J. C. compounded on his resurvey in time; or if J. H.'s certificate was not in the office when J. C. did compound, though not in time, and obtained his grant, then J. C. was a fair purchaser for a valuable consideration without notice of the equitable interest of J. H. and the grant to J. C. cannot be overreached by relation.

If vacant land, not contiguous to the original tract resurveyed, is included in the certificate of resurvey, it is not legal notice of the location of the warrant, until the certificate is returned to the land office.

If an assigned land warrant was applied in time to the payment of composition money on vacant land included in a certificate of resurvey, such application will be equivalent to the payment of so much money.

The jury are to find when the composition money was paid on a certificate of survey.

A naked possession, (possession without right,) is adversary only to the extent of actual enclosures. (b)

Where the plaintiff's grant operated by relation to the date of the certificate, and overreached the defendant's elder grant for the same land, the entry of the grantee, under such elder grant, and the possession by him, and those claiming under him, was without right, and cannot bar the plaintiff's recovery, unless such possession was by actual enclosures for 20 years prior to the bringing the ejectment. (c)

To entitle a party to the benefit of the relation of his grant to the certificate, it is incumbent on him to shew an equity; and the producing copies under seal of the warrant, certificate and grant, is not sufficient to entitle him to such benefit.

The time when a certificate was returned to the land office, is a matter of fact determinable by the jury. (d)

A petition to the Judges of the land office by T. D. with certain alterations made therein in the hand-writing of a clerk in that office, (now dead,)

(a) See *Hammond vs. Norris*, ante, m. p. 180, note; *Buckingham vs. Dorsey*, 1 Md. Ch. 32.

(b) Examined in *Cresap vs. Hutson*, 9 Gill, 277, and in *Hoye vs. Swan*, 5 Md. 231. By Code, Art. 75, sec. 52, actual enclosure is not necessary to prove possession, but acts of exclusive owner and usership may be given in evidence. See *Thistle vs. Frostbury Coal Co.* 10 Md. 129; *Gittings vs. Moale*, 21 Md. 135; *Beatty vs. Mason*, 30 Md. 414.

(c) Cited in *Merryman vs. Bourne*, 9 Wallace, 603. See *Garretson vs. Cole*, 2 H. & McH. 805.

(d) See *Stewart vs. Mason*, 3 H. & J. 507.

stating when a certificate was returned, not permitted to be given in evidence, as a circumstance to prove at what time the certificate was returned, or to prove it was returned before a certain period, as the party against whom the testimony is intended to operate does not derive any interest in the land in question under T. D.

APPEAL from the General Court. Ejectment for a tract of land called Part of Wood's Inclosure, lying in Frederick County, containing 2,286 acres. The defendant, (now appellee,) took defence on warrant, under the general issue plea, for a tract of land called The Resurvey on Hobson's Choice.

**152** \* 1. At the trial at May Term, 1803, the defendant produced the honorable Alexander Contee Hanson, Chancellor, and Judge of the Land Office for the Western Shore, and proposed to him the following question, to wit: "If a certificate on a warrant of resurvey is returned, in which vacant land is included, not contiguous to the original, but separated by elder surveys, and the person returning the said certificate has paid the caution for the land not contiguous to the original, and no patent has issued, and a man by a warrant taken out after the payment of the said caution money, returns a certificate including the vacancy comprehended in the certificate of the survey which is not contiguous to the original, and pays the caution money; if the above facts appear to the Judges of the land office, would not, by the laws of the land office, the former certificate be vacated as to the vacancy not contiguous, and patent issue to the younger certificate?" But the counsel for the plaintiff objected to the question put to the witness.

CHASE, Ch. J. The Courts of justice will take notice of the rules of the land office as forming regulations relative to property, and will direct the jury as to the law arising from such rules. The rules of the land office cannot be proved by witnesses; they are to be found on the records of the land office, and in the proclamations of the Proprietary. Opinions as to the rules of the land office cannot be received as evidence. The usage and practice of the land office must be proved by the adjudications of the Judges of the land office, and not by the opinions of the witnesses as to what that usage and practice may be. The adjudications contain the legal information as to what have been the usage and practice in the land office. The Court therefore refuse to allow the witness to be examined. The defendant excepted.

2. The plaintiff offered in evidence the same title which was offered in evidence in the case of the same plaintiff against John Norris, tried at the present term, and which title is particularly set out in the fourth bill of exceptions taken in that cause. (*Ante*, 132.) The plaintiff then proved that the land referred to, called Wood's Lot, acquired by reputation the name of Wood's Inclosure, and that

they are one and the same tract of land. The defendant \* then read in evidence a patent granted to John Carmack, Stephen **153** Richards, and Daniel Richards, for a tract of land called Hobson's Choice, dated the 23d of January, 1753, for 25 acres. Also a warrant of resurvey granted to the said patentees on the 18th of April, 1753. Also a certificate made in virtue of that warrant, dated the 4th of September, 1753, and the land called The Resurvey on Hobson's Choice, containing 395 acres, which was examined and passed the 1st of July, 1755. Also the patent which issued in virtue of that certificate, to Basil Dorsey, dated the 19th of May, 1755, stating that the certificate had been, on the 19th of May, 1755, assigned to him by Carmack and Richards. Also an order of the land office for granting a certain warrant, and the warrant which issued in virtue thereof, dated the 15th of October, 1754, to Henrietta Maria Dulany, for 3,000 acres. Also a renewal of that warrant on the 7th of April, 1755, to H. M. Dulany for 1,127 acres. Also the marginal entries on the warrant, showing how the same had been employed, viz: "370 acres assigned Basil Dorsey, and applied to The Resurvey on Hobson's Choice." Also an assignment from H. M. Dulany to B. Dorsey, for 370 acres, a part of the said warrant. He also offered evidence to prove that the certificate of Part of Wood's Inclosure, was not returned to the land office at any time on or before the 19th of May, 1755. The defendant then prayed the opinion of the Court, and their direction to the jury, that the patent of Part of Wood's Inclosure, cannot relate to the date of the certificate thereof, or to the time of paying the caution money on the certificate, so as to overreach the title of the defendant under the patent of The Resurvey on Hobson's Choice, but that the title under the last mentioned patent, is an elder title than that under the certificate of Part of Wood's Inclosure. He also prayed the opinion of the Court, &c. that if from the evidence the jury do not find that the certificate of John Howard was returned to and in the land office when Basil Dorsey compounded on the certificate for The Resurvey on Hobson's Choice, and obtained his patent for the same, that in that event B. Dorsey, though the payment of the composition money made by him was not within two years after the date of the warrant in virtue of which The Resurvey on Hobson's Choice was resurveyed, was a fair purchaser for a valuable consideration, without \* notice, of the equitable interest of J. Howard, and the patent to B. Dorsey, **154** cannot be overreached or defeated by relation. And he further prayed the opinion and direction of the Court, &c. that if the jury should be of opinion, from the evidence before them that the assignment by H. M. Dulany to B. Dorsey, was made before the 18th of April, 1755, then the payment of the caution money made by him on his certificate of The Resurvey on Hobson's Choice, will take effect and have operation in the same manner as if the payment had been made before the 18th of April, 1755.

CHASE, Ch. J. The Court are of opinion, that if it appears to the jury that the warrant of resurvey, taken out by John Howard, was located on the 5th of March, 1753, and the certificate was returned on or before the 18th of April, 1753, when the warrant of resurvey on Hobson's Choice was taken out by John Carmack, Stephen and Daniel Richards, and that the composition money was paid by Philip Hammond, the assignee of Howard, within two years from the date of his warrant, then the patent to Philip Hammond, and others, will operate from the date of the certificate. But if the certificate on the warrant taken out by J. Howard was not returned to, and in the land office on the 18th of April, 1753, and the jury find that Carmack and Richards, or B. Dorsey, did compound on the certificate on the warrant on Hobson's Choice, within two years from the date of that warrant, then the patent to Hammond and others cannot operate by relation to the date of the certificate, and overreach the patent to B. Dorsey.

But if the jury do not find the composition money was paid within two years from the date of the warrant, by Carmack and Richards, or B. Dorsey, and do find that the certificate of J. Howard was returned to, and in the land office when B. Dorsey compounded on the certificate for The Resurvey on Hobson's Choice, then the patent to Hammond and others will operate by relation to the certificate; but if the jury do not find that the certificate of J. Howard was returned to, and in the land office when B. Dorsey compounded on the certificate for The Resurvey on Hobson's Choice, and obtained his patent for the same, in that event B. Dorsey, though the payment of the composition money made by him was not within two

**155** years \* after the date of the warrant, in virtue of which The Resurvey on Hobson's Choice was resurveyed, was a fair purchaser for a valuable consideration without notice of the equitable interest of J. Howard, and the patent to B. Dorsey cannot be overreached or defeated by relation—The Court being of opinion, that as the land, (on which the warrant of resurvey of J. Howard was located,) was not contiguous to the original tract resurveyed, there could be no legal notice of the location of the warrant but on return of the certificate to the land office.

The Court are also of opinion, that if warrant was applied by Carmack and Richards, or B. Dorsey, in payment of the caution money, within two years from the date of the warrant granted to Carmack and Richards, that such application of warrant will be equivalent to the payment of so much money. But the Court are also of opinion, that, although the assignment by H. M. Dulany to B. Dorsey was made before the 18th of April, 1755, the payment of the caution money made by him will not take effect as a payment unless the warrant was so applied by him within two years from the date of the warrant. The defendant excepted.



3. The plaintiff then offered to prove that the usage and custom of returning certificates to the land office was, that the surveyors who made the certificates respectively returned them to the land office, and from the land office the certificates were sent by the clerk or register to the examiner-general for examination, by whom again they were generally returned to the land office. He then prayed the opinion of the Court, and their direction to the jury, that if they do find the composition money was not paid within two years from the 18th of April, 1753, by Carmack and Richards, or B. Dorsey, that then the patent to P. Hammond and others will operate by relation to the certificate, although the jury shall find that the certificate was not returned to the land office before the 18th of April, 1753; provided the composition money was paid on the certificate of Part of Wood's Inclosure before the composition money was paid on the survey made in pursuance of the warrant of resurvey which issued on the 18th of April, 1753. He also prayed the direction of the Court to the jury, that the \* application of common warrant to compound on the resurvey made under the warrant of the 18th of April, 1753, can have no other effect than if the caution money had been paid in money; and that although they find that the common warrant, which was applied as composition money, issued on the 5th of April, 1755, yet it can only be considered a payment for the land included in the survey made under the warrant of the 18th of April, 1753, from the time it was applied as a payment, and cannot go back, either to the 5th of April, 1755, or to the time it was assigned to B. Dorsey who made the payment with it. **156**

CHASE, Ch. J. delivered the same opinion of the Court, as that given on the defendant's prayer in the preceding bill of exceptions, excluding the first section of that opinion. The plaintiff excepted; and the defendant also excepted to so much of the opinion of the Court as determines, that under the circumstances as stated, which in the opinion of the Court, will entitle the patent for Part of Wood's Inclosure to a relation to the certificate so as to overreach the patent for The Resurvey on Hobson's Choice, under which the defendant makes title.

4. The defendant then offered evidence that B. Dorsey, the patentee, in virtue of his resurvey, entered into, and was possessed of The Resurvey on Hobson's Choice in the year 1755, and continued so possessed until his death, which happened in the year 1763; that by his will he devised the land to his son Dennis in tail, remainder to his daughters. That in the month of April, 1774, Dennis Dorsey, the devisee, then a minor of the age of 18 years, entered upon The Resurvey on Hobson's Choice, and had the same surveyed and run out; that he continued so to possess the land until his death, which happened in the year 1778. That D. Dorsey died intestate and without issue, leaving three sisters, to wit, Ariana, married to Thomas

Sollers, Eleanor married to Upton Sheredine, and Elizabeth married to Ephraim Howard. That after the death of D. Dorsey, the said Sollers, Sheredine and Howard, in right of their wives, entered into the land, and were possessed thereof until the 22d of February, 1779, when they, together with their wives, conveyed the land to the present defendant, who in virtue of that deed entered into the land

**157** \* on the same day, and was possessed thereof, and has continued so possessed until this time. He then offered in evidence, from the rent rolls in the land office, that the said land, upon being patented to B. Dorsey, was also charged to him in the rent rolls; and also the debt books of the late Lord Proprietary, whereby it appears that the quit rents due upon the said land were in the debt books charged to B. Dorsey, and were by him paid from the year 1756, until his death in 1763; and that after his death, the quit rents were in the debt books charged to, and paid by, D. Dorsey the devisee, from the year 1763, until the revolution abolished the Proprietary quit rents. The defendant then prayed the opinion of the Court, and their direction to the jury, that if they should be of opinion, from the whole evidence before them, that B. Dorsey came into the actual possession of The Resurvey on Hobson's Choice, claiming the whole thereof under and by virtue of the patent thereof granted to him, before the 3d of May, 1760, when P. Hammond, the father of Charles, and grandfather of Philip, one of the lessors of the plaintiff, died, and that B. Dorsey was on that day in the actual possession of that tract, claiming the whole, and that he, and those claiming under him, other than the lessors of the plaintiff, and those under whom they claim, have been in the actual possession thereof, claiming the whole, from the day last aforesaid until the time of bringing this action, then the plaintiff cannot recover, unless it should be satisfactorily proved to the jury, on his part, that Charles Hammond, son of Philip, or some person claiming under him, made an actual entry into Part of Wood's Inclosure, claiming the whole thereof, at some time within twenty years next after the 3d of May, 1760.

*Harper*, for the defendant, cited *Russell's Lessee vs. Baker*, 1 H. & J. 71; *Davidson vs. Beatty*, 3 H. & McH. 594; *Miller vs. Hynson*, (in the Provincial Court, May Term, 1734;) *Hawkins' Lessee vs. Bolton*, (*Ibid*, April Term, 1745;) *M'Crackin et ux. Lessee vs. Harris*, (*Ibid*, May Term, 1748;) 2 *Blk. Com.* 311, 312; *Co. Litt.* 15 a, sec. 8; *Taylor vs. Horde et al.* 1 *Burr.* 119; *Bac. Ab. tit. Trespass*, (C. 3;) *Bro. Ab. tit. Surrender*, 245 b; 1 *Leon.* 209; 2 *Leon.* 147; 4 *Leon.* 184; 2 *Roll. Ab. tit. Trespass*, 553, 554.

**158** \* CHASE, Ch. J. A naked possession, (possession without right,) is only adversary to the extent of actual inclosures. If the patent to P. Hammond and others relates to the certificate, the

Dorseys and the defendant had only a naked possession, and limitation by adversary possession is only to the extent of inclosures.

The Court are of opinion, that if the patent to P. Hammond and others doth operate by relation from the date of the certificate, that in such event the patent to B. Dorsey for The Resurvey on Hobson's Choice, which is stated to be included in the patent to P. Hammond, and others, doth not pass any thing, but is altogether inoperative, and the entry of B. Dorsey, and the possession by him, and those claiming under him, was without right, and that such possession cannot bar the plaintiff, if the jury do find the facts stated by the plaintiff, unless they also find that such possession was by actual inclosures for twenty years or upwards, prior to the bringing this ejectment; and in such case, it would only be a bar to the extent of such actual adversary possession by enclosure. The defendant excepted.

5. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if they find and believe the facts to be true as stated by him, that then, upon principles of law, when the patent, under which he claims, was obtained from the land office for the land included in the certificate of resurvey, the patent related to the date of the certificate, and operates to give title from that time, unless facts are proved to rebut and defeat such relation; and that the defendant, on his part, must prove all facts necessary to defeat such relation, it being only incumbent on the plaintiff to produce office copies, under seal, of the warrant, certificate and patent, to claim on his part the benefit of relation.

CHASE, Ch. J. The Court are of opinion, that the relation of the patent to the certificate, so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law introduced for the attainment of justice, and to prevent circuity of action—the Court doing that which a Court of equity would effect.

\* The Court refuse to give the direction prayed, being of opinion that it is incumbent on the plaintiff to show an equity **159** to entitle him to the benefit of relation, and the producing copies, under seal, of the warrant, certificate and patent, is not sufficient to entitle him to such benefit. The plaintiff excepted.

6. The plaintiff having given in evidence the certificate and patent for Part of Wood's Inclosure, and that the certificate was examined and passed on the 6th of March, 1754, and the caution money paid on the 6th of March, 1754; and having proved, that before the year 1766, it was not the practice of the land office that the time of the return of the certificates should be endorsed on the certificates respectively; and also having given in evidence that, under the Proprietary government, it was the usual practice for the surveyor to return to the office the certificates for the office, and for the clerk of the land office to send the certificates to the examiner-general to be

examined, and for him to return the same, after examination, to the clerk of the land office; applied to the Court to instruct the jury, that these facts, so offered in evidence, are sufficient to prove that the said certificate was duly returned to the land office on or before the 5th of March, 1754, unless the defendant can prove the contrary.

CHASE, Ch. J. The Court refuse to give the direction prayed, being of opinion, that the time when the certificate was returned, is a matter of fact determinable by the jury, upon the whole evidence relative to that fact given by the plaintiff and the defendant. The plaintiff excepted.

7. The plaintiff then offered in evidence, that the office of the examiner-general, and the office of the agent, to whom the caution money was paid, were held in the City of Annapolis, and that the party, after his certificate was examined and passed, and returned to the office, was accustomed to carry his certificate to the office of the agent, and pay the caution money thereon, and to bring the same back to the office; and that after the certificate was compounded on, the party could not take his certificate out of the office, without applying to the Judge of the land office, and obtaining his permission for that purpose, and that before the certificate was taken out on such permission, the party \* was required to  
**160** give a receipt for the same, which receipt was kept in a memorandum book for that and other purposes. It was offered in evidence, that the said memorandum book, as well as other memorandum books, which had been kept for particular purposes in the land office under the Proprietary government, have been lost or destroyed. That in such instances, under the Proprietary government, in which the parties themselves carried the certificates to the land office; they were carried there before they were examined and passed, and were sent to the examiner-general by the clerk of the land office to be examined, in the same manner as if returned into the office by the surveyor. And it was also given in evidence by John Callahan, Esquire, Register of the Land Office, who had been examined as to the foregoing facts, that before the year 1760, it was not the practice or usage in the land office to endorse on the certificate the time when the certificate was received into the office; that when a warrant of any kind was issued for the surveying or taking up of land, it was immediately entered up and recorded in a record book kept in the land office for that purpose; that when a person applied to the office to caveat any certificate, if the same was not in the office, or could not conveniently be found, it was usual to enter the caveat in the margin of the warrant; that under the Proprietary government, a caveat docket was regularly kept, in which was also entered every caveat as soon as made; but that those dockets are now lost. That where a certificate was caveated, the Judge of the land office did not act upon the caveat and dismiss the same, under the Pro-

prietary government, unless the certificate was in the office, that the witness knew of no instance to the contrary; and that it was the usual practice to endorse the dismissal of the caveat on the certificate. That if a caveat was entered, it was not the usage of the office to have patents made out, sent to the Governor to be sealed, returned to the office and recorded, until a hearing and dismissal of the caveat; and that although the caveat had remained more than six months unacted upon and unrenewed, yet it was not the practice and usage of the land office, under the Proprietary government, to have the caveat dismissed, and patent issued and recorded, unless on particular application of the party entitled to the patent. The plaintiff further offered \* in evidence, that the said Callahan was, **161** when examined, in the forty-ninth year of his age; that he first went to write in the land office in the latter end of the year 1767, and continued in that office nearly the whole time, until the formation and adoption of our present government; that when he went to write in the land office, William Steuart was the clerk of the land office, and continued such until some time in the year 1774, when David Steuart succeeded him in the said appointment, and continued to hold that office until the appointment of Saint George Peale, as register of the land office, in April, 1777; and that at the time the said Callahan first went to write in the land office, Saint George Peale was the eldest clerk or writer in that office, employed by William Steuart, (who was not very often himself in the office,) and remained so until he was appointed register. That during the American Revolution, to wit, sometime in the month of January, 1776, the books, records and papers, belonging to the land office were packed up and removed to Upper Marlborough, where they were kept until sometime in July, 1778, when they were brought back again to the City of Annapolis, and that by such removal some loss and injury had happened to some of the books and papers. The plaintiff further offered in evidence the assignment of the certificate for Part of Wood's Inclosure, and that it was made and executed on a separate piece of paper, and that the assignment is annexed, by wafers, to one side of a sheet of the original certificate in the land office, and that the side of the sheet, to which it is so annexed, is blank, and not written upon. The assignment is of "the certificate returned on a certain resurvey had and made upon 86 acres of land, being part of a tract of land called Wood's Inclosure, originally taken up by Joseph Wood." He further offered in evidence, that the certificate of Part of Wood's Inclosure, now remaining in the land office, comprises and is written upon two sheets of paper; and that the said Callahan had no knowledge that the certificate was ever out of the office from the time the caution money was paid thereon. The said Callahan further in his testimony declared, that he had no knowledge what was the usage and practice in the land office in the year 1753, and for many years after;

that when he spoke of the usages and practices of the land office, he meant the usages and practices while \* he was a writer therein, which he supposes conformable to the usage and practices which had been in former periods adopted. That it was the general practice of the land office, and that he did not recollect an instance to the contrary, that caveats were not heard and decided upon, unless the certificate caveated was in the office at the time of decision; and that it was the practice to note on the certificates caveated, the decisions made thereon, allowing or disallowing the caveats. The plaintiff also offered in evidence three original certificates from the land office, with the warrants under which the surveys were made, and the endorsements in the margin of the warrants of caveats having been entered against patents issuing on those certificates; and that neither the caveats, the orders, nor decisions made thereon, appear on the certificates. He also offered in evidence a large bundle of original certificates, returned to the land office, from Frederick County, for the year 1753, amounting to the number of 120, and the same were brought into Court, and offered in evidence in the order in which they were found in the land office, and that in the number aforesaid they were only three certificates on which caveats were noted. The defendant then offered to prove, that there is no endorsement upon the certificate now in the land office for Part of Wood's Inclosure, of the time when it was returned to the land office; and also proved by John Callahan, Esquire, register of the land office, that when a certificate of survey or resurvey was returned to the said office, and remained therein, and was caveated by any person who opposed a grant issuing thereon, it was customary to endorse the entering of the caveat upon the back of the certificate so caveated; but that if the certificate was not in the land office when the caveat was so entered, that then it was customary to make an entry of the caveat in the margin of the warrant book, opposite to the warrant upon which the certificate was founded. He then produced from the land office, and showed to the jury, the warrant upon which this certificate was founded, and the book in which the same is entered; and also showed, that in the margin thereof, opposite to the warrant, it is entered that Greenbury Ridgely did, on the 12th day of July, 1754, enter a caveat against a grant issuing on the certificate for Part of Wood's Inclosure. He then \* produced the original certificate for Part of Wood's Inclosure, and from the same showed to the jury that there is no entry upon that certificate, made by any clerk or officer in the land office, by which it can be inferred that the same was in the land office, until the 30th of January, 1772, when there is an entry thereon that the same was caveated by Philip, Rezin, and Matthias Hammond, sons of P. Hammond, (to whom the same certificate had been assigned by J. Howard,) and that the certificate has no plot or table of courses annexed thereto,

or filed therewith. He then offered in evidence, that although it it was customary for the surveyor, who made out a certificate before the Revolution, to return the same to the land office, from whence it was transmitted to the examiner-general, yet there was no regulation which prevented the party himself from bringing his own certificate, and carrying it himself to the examiner, previous to its coming into the land office; and that before the Revolution, as well as since, it was the business of the owner of a certificate, which had been examined and passed, to carry the same to the person authorized to receive the composition money, that he might ascertain the sum to be paid thereon, and to pay the composition money to the person so authorized to receive the same. That on the 14th of June, 1733, there was a Proprietary order respecting the continuance of caveats, in the words following: "That no caveat be permitted to be renewed after the expiration of six months." That on the 19th of December, 1768, there was a second Proprietary order on the same subject, in the words following: "That no caveat be permitted to continue longer than six months, nor be renewed after that time, unless upon very special circumstances." He also offered evidence, that no charge, before the Revolution, was entered upon the Proprietary rent rolls for lands against any person, until the lands were patented, and no account raised against any person as the holder of lands, for quit rents as due to the Proprietary, except for lands which were patented. That whenever a certificate was returned to the land office, and had been examined and passed, and compounded on, it was the interest of the Proprietary that it should be patented; and if such certificate remained in the land office, and there was no legal objection to patent issuing thereon, it was customary to issue a patent thereon, and charge the grantee with the quit rents \* due thereon to the Proprietary. It is admitted that the whole of the evidence offered by both plaintiff and 164 defendant, as stated herein preparatory to the taking this bill of exceptions, so far as the same is not derived from papers of the land office, herein stated and referred to, is derived from John Callahan, Esquire, register of the land office. That one of three certificates, hereinbefore referred to by the plaintiff, as the case of a certificate caveated whereon the caveat was entered in the margin of the warrant and not upon the certificate, was as followeth: The original certificate bore date on the 22d of July, 1754, upon which there was a caveat entered on the 26th of February, 1756, by one J. Bayne; that this caveat was entered on the margin of the warrant, and also on the certificate returned to, filed, and now remaining in the land office; that the said certificate was afterwards amended, and the amended certificate, bearing date on the 26th of May, 1769, returned to the land office, upon which amended certificate a patent issued on the 15th of November, 1769, and in the margin of the warrant, upon which the same issued, there was an entry in these

words "caveat overruled. Patent issued 15 October, 1769," of which proceeding there was no entry, either upon the original certificate, or upon the amended certificate. The plaintiff then offered to give in evidence a petition preferred by Thomas Dorsey, on the 29th of October, 1772, to the Judges of the land office caveating the certificate for Part of Wood's Inclosure, which was originally drawn in the hand-writing of Samuel Chase, Esquire, and which remains in the land office. The petition, as originally drawn, after stating the issuing the warrant, the resurvey, &c. was as follows: "That the said certificate was never returned to the land office, but kept by the said Philip Hammond in his possession, till his death in the year 1761. That the said certificate was kept by a certain John Hammond, Esquire, son of the said Philip, or by the said, a certain Charles Hammond, Esquire, or one of them, from the death of the said Philip until the month of June, 1771," &c. which petition appears on the face of it to have been altered so as to read as follows: "That the said certificate was, on the 4th of October, 1753, returned to the land office, that the said certificate was, on the 13th of October, 1763, withdrawn out of the land office by a certain John Hammond, Esquire, \* son of the said Philip, 'till the month of June, 1771," &c. And the plaintiff offered to give in evidence, that the alteration made in the petition, by inserting the words and figures, "on the 4th of October, 1753," and the words and figures, "on the 13th of October, 1763, withdrawn out of the land office," is in the hand-writing of St. George Peale; and that St. George Peale departed this life some time in the year 1779.

**165** CHASE, Ch. J. The Court refuse to permit the plaintiff to give in evidence to the jury the petition preferred to the Judges of the land office by Thomas Dorsey, and the alterations therein, in the hand-writing of Saint George Peale, as a circumstance to prove at what time the certificate for Part of Wood's Inclosure was returned into the land office, or to prove that it was returned into the office on or before the 5th of March, 1754, the Court being of opinion, that it is inadmissible for that purpose, as the defendant does not derive any interest in the land in question under Thomas Dorsey, by whom the petition was also preferred to the Judges of the land office. The plaintiff excepted; and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued in this Court at the last June Term, before TILGHMAN, NICHOLSON, and GANNT, JJ. upon the several bills of exceptions taken at the trial by the plaintiff in the Court below, being those herein numbered 3, 5, 6, and 7.

*Key*, and *Johnson* (Attorney-General,) for the appellant, on the third bill of exceptions, contended, that the relation of a patent to



the certificate of survey depended alone upon those facts which appeared upon record; that a Court of law could not travel out of the record and take into consideration that which did not appear of record; and that where relation had been refused at law, it was upon the ground of something appearing on record. They cited *Garretson's Lessee vs. Cole*, 2 H. & McH. 459; *Garretson vs. Cole*, 1 H. & J. 370; *Morris vs. Pugh*, 3 Burr. 1243; *Shep. Ab.* 151. That if the Court could travel out of the record for proof that the certificate of survey was out of the land office, they could, with the \* same propriety, admit parol proof that the party, claiming under a junior survey, had notice of the prior one, although it was not in the office. **166**

On the fifth bill of exceptions—That if the relation of a grant to the certificate of survey was objected to, it was incumbent on the party objecting, to show that the party, claiming the relation, stood in such a situation that he was not entitled to it. *Shelley's Case*, 1 Coke, 99; *Sicann vs. Broome*, 3 Burr. 1596.

*Shaaff and Harper*, for the appellee on the third and fifth bills of exceptions, contended, that there was no evidence given by the plaintiff below, that the certificate for Part of Wood's Inclosure was in the office before the patent was granted to Dorsey; and that there was negative evidence offered by the defendant. But that even if it was in the office at that time, the relation of the grant to the certificate ought not to be allowed, as Howard had violated the rules and regulations of the office, by obtaining a warrant to resurvey land in which he had no estate, and by including in his resurvey vacant land not contiguous to the original tract resurveyed. That the relation of a grant to the certificate was not a fixed and positive rule of law, but depended upon the nature of the right, and was never allowed unless it was to produce right. That the doctrine of relation was founded upon principles of equity, and it was the act of the law, and not of the parties, and was never allowed to divest a lawful vested estate, unless upon equitable principles. *Howard vs. Cromwell*, 1 H. & J. 115; *Peter vs. Mains*, 4 H. & McH. 423; *Ringgold vs. Malott*, 1 H. & J. 299; *Beall vs. Beall*, *Ibid.* 346; *Shep. Ab.* (3d part,) 149, 150; \* *Butler & Baker's Case*, 3 Coke, 28 b; 3 Blk. Com. 43; *Co. Litt.* 150 a; *Land Hold. Ass.* 135, 137, 149, 151, 152, 153, 154; they also contended, that the application of the land warrant, in payment of the composition money on Dorsey's resurvey, ought to be on the day it was assigned to him. **167**

On the sixth bill of exceptions, that it was a matter of fact for the jury to ascertain when a certificate of survey was returned to the land office, as the time when it was returned was not endorsed thereon by the register. *Carroll vs. Norwood*, 1 H. & J. 172.

*Curia adv. vult.*

THE COURT, at this term, concurred in the opinions pronounced by the General Court in the several bills of exceptions taken on the part of the plaintiff below.

*Judgment affirmed.*

BEALL *et al.* Lessee *vs.* HARWOOD.

In the construction of an Act of Assembly, the intention of the Legislature is to prevail, and is to be collected from the whole of the law, and the circumstances which produced it. (a)

Where lands had been devised by A. to his son B. in tail male, remainder in tail male to his eldest son C. remainder in tail male to his third son D. remainder in fee to his two daughters E. and F. as tenants in common—B. by his petition to the Legislature stated, that he had only female heirs, (viz. two daughters, L. and M.) who could not inherit the lands after his death, whereby it would descend to his eldest brother C. (who united in the petition;) he therefore prayed that an Act might pass to vest an estate of inheritance in fee simple in the said lands in his female heirs, in case he should have no male heirs at the time of his death; and in default of issue of his said female heirs, the said lands to descend according to the will of his father. Which prayer being thought reasonable, the Legislature by an Act, reciting the facts and the prayer set forth in the petition, vested the said lands in the said female heirs of B. their heirs and assigns, with a proviso, that if B. should have any male heirs of his body at the time of his death, or that the said female heirs of B. should not have issue, then the lands should descend and stand limited as by the will of A. was devised. Afterwards B. had a son born named G. who died in the life-time of B. leaving three daughters, H. J. and K. During the life of G. (in 1791,) the lands were conveyed to him in fee by B. of which he died seized, leaving the said three daughters. B. afterwards died, leaving issue his said two daughters L. and M. who entered, &c. They are both since dead, M. having survived L. leaving a daughter N. married to the defendant. On an ejectment brought in the name of the lessee of H. J. and K. the three daughters of G.—held that male heirs in the Act of Assembly, meant the two daughters of B. and that an estate in fee simple vested in them, to be defeated and divested out of them on the happening of either of two contingencies, 1st. If B. left issue male at the time of his death; and 2d. If B. should die without leaving issue male at the time of his death, and his two daughters should die without leaving issue; and that the plaintiff was not entitled to recover. (b)

A mortgagor cannot support an ejectment for the land mortgaged, unless he can show that the mortgage had been satisfied previous to the bringing the ejectment. (c)

(a) Affirmed in *Charles vs. Clagett*, 3 Md. 87, and in *Cearfoss vs. State*, 42 Md. 407. See *Canal Co. vs. R. R. Co.* 4 G. & J. 1.

(b) See *Griffith vs. Ridgely*, 2 H. & McH. 275, note (a.) In *Campbell's Case*, 2 Bland, 238, 234, the Chancellor said that private Acts of Assembly, which have been common in Maryland from the earliest period of the Proprietary government, have, in many respects been construed and executed as mere conveyances, binding only upon those who are parties to their passage.

(c) Approved in *Brown vs. Stewart*, 56 Md. 430, and in *Berry vs. Derwart*, 55 Md. 73.

APPEAL from the General Court. Ejectment for a tract of land called Buzzard Island, lying in Calvert County. \* The defendant, (the present appellee,) took general defence and issue **168** was joined on the plea of *non cul.* 1. The plaintiff at the trial, (May Term, 1804,) gave in evidence a grant dated the 25th of March, 1652, to William Stone, for the land for which the ejectment was brought. Also that Stone, the grantee, on the 13th of November, 1717, conveyed the land in fee simple to Leonard Hollyday, (the first.) That Hollyday, on the 7th of November, 1739, by his last will and testament, devised the land in question. First.—To his son Leonard, (the second,) in tail male. Secondly.—Remainder in tail male to his eldest son Thomas. Thirdly.—Remainder in tail male to his third son Clement; and Fourthly.—Remainder in fee to his two daughters Elizabeth and Mary, as tenants in common. That Leonard Hollyday, (the first,) died on the 10th of December, 1739, seized of the land, leaving three sons and two daughters, to wit: Thomas, his eldest son, Leonard, (the second,) his second son, Clement, his third son, and Elizabeth and Mary, his daughters. That Leonard Hollyday, (the second,) entered upon the land by virtue of the devise, and was seized thereof *prout lex postulat*; and being so seized, and having only two female children, a petition was presented to the General Assembly of the Province of Maryland, at February Session, 1756, and in consequence of that petition an Act of Assembly was enacted during the same session, (ch. 17,) entitled, “An Act to vest certain intailed lands therein mentioned in the female heirs of Leonard Hollyday, gentleman, in fee simple;” reciting, that “Whereas Thomas Hollyday and Leonard Hollyday, gentlemen, by their humble petition to this General Assembly, did set forth that their father, Leonard Hollyday, of Prince George’s County, gent. in the year 1741, died seized of two tracts of land lying in Calvert County, the one called Buzzard Island, and the other called The Addition to Buzzard Island, the whole containing 751 acres, and that by his last will and testament he devised the same to his second son Leonard Hollyday, one of the petitioners, and to his male heirs, and for want of such issue to his eldest son Thomas Hollyday and his male heirs; that Leonard Hollyday had only female heirs, who could not inherit the said land after his death, whereby it would descend to his eldest brother Thomas, who by letter had signified his consent, and is party to the said petition; that the said land was unimproved \* at the time of the death of their father, since which it has cost **169** the present possessor, Leonard Hollyday, who lives thereon, a considerable sum of money to improve the same; that the said land had been in the possession of the father of the petitioners ever since the year 1685, and never been claimed by any other person; wherefore they prayed that an Act of Assembly might pass to vest an estate of inheritance in fee simple in the said land called Buzzard Island and The Addition to Buzzard Island, in the female heirs of the said

Leonard Hollyday, in case he should have no male heirs at the time of his death; and that in default of issue in the said female heirs, the said land to descend according to the will of the father of the petitioners; and the prayer of the petitioners, in the said petition contained being thought reasonable, the same was granted, and leave given to bring in a bill according to the petitioners' prayer;" and it was accordingly enacted, "that the said tract of land called Buzzard Island and The Addition to Buzzard Island, containing in the whole 751 acres, with the appurtenances, in Calvert County aforesaid, so as aforesaid devised by the said Leonard Hollyday, the father, to his second son Leonard Hollyday, and his male heirs, shall be and the same are hereby vested in the said female heirs of Leonard Hollyday, the son, their heirs and assigns, to the only use and behoof of them the said female heirs of the said Leonard Hollyday, the son, their heirs and assigns, for ever; *Provided always*, and it is the true intent and meaning of this Act, that if the said Leonard Hollyday shall have any male heirs of his body at the time of his death, or that the said female heirs of the said Leonard Hollyday shall not have issue, that then and in such case the said land called Buzzard Island and The Addition to Buzzard Island, with the appurtenances, shall descend and stand limited as by the last will and testament of the said Leonard Hollyday, the testator, is devised, any law, usage or custom, to the contrary in any wise notwithstanding; *saving* to the King's most excellent majesty, his heirs and successors, to the right honorable the Lord Proprietary, his heirs and successors, and to all and every other person and persons not mentioned in this Act, bodies politic and corporate, their respective heirs and successors, all such right, title, estate, interest, claim and demand, other than the persons claiming under the last will of the said \* Leonard

**170** Hollyday, the father, and this Act, as they, every or any of them, could or might claim if this Act had never been made." Afterwards Leonard, (the second) had a son, Leonard, (the third,) who died in the life-time of his father, leaving three daughters, the lessors of the plaintiff. Leonard (the second) on the 1st of February, 1791, in the life-time of his son Leonard, (the third,) by a deed of bargain and sale duly executed, acknowledged and recorded, for a valuable consideration, bargained and sold the said tracts of land, and all his right and interest therein to his son Leonard, (the third,) in fee. Leonard, (the third,) in virtue of that deed entered upon the lands, and was seized thereof *prout lex postulat*; and being so seized, died sometime in the year 1793, leaving three daughters, Elizabeth, Grace Contee, (wife of Aquila Beall) and Margaret Terrett, the lessors of the plaintiff, his only children and heirs. Leonard, (the second,) died in or about the year 1794, leaving issue two daughters. The defendant then gave in evidence, that Leonard, (the second,) before and at the time of his petition to the General Assembly in 1756, and at the time of the passage of the law, herein before inserted, had issue two infant

daughters, Sarah, born in 1754, afterwards married to Thomas Johns, and Anne, born in 1755, afterwards married to Walter B. Cox; that in the year 1757, Leonard, (the second,) had a son, Leonard, (the third,) who afterwards died in 1793, without issue male, leaving his father and two sisters his survivors; and that the youngest of the sisters, Anne, was 15 years older than Leonard, (the third.) That Leonard, (the second,) died in 1794, and his two daughters, Mrs. Johns and Mrs. Cox, survived him. And afterwards Mrs. Johns, and her husband, died, and her sister, Mrs. Cox, and her husband, survived them; on the death of Leonard, (the second,) without issue male, Walter B. Cox, and Anne his wife, claiming under the said Act of Assembly, entered upon and were seized of the lands aforesaid in the declaration mentioned, until the death of Cox; that Anne Cox survived her husband, and died seized and in possession of said lands, leaving issue by Walter B. Cox, a daughter, her only child and heir, who married the defendant; and that the defendant, in virtue of said marriage, on the death of Anne, the mother, entered on and was seized of the lands, and yet is in possession thereof. The plaintiff then \* prayed the Court to instruct the jury, that upon the aforesaid evidence, if they believed the facts so offered in evidence to be true, the plaintiff was entitled to recover. 171

CHASE, Ch. J. In this case the counsel have said every thing which could be suggested upon the subject. They have made use of ingenious arguments. There can be no doubt but it has been fully and ably argued on both sides.

The Court think, that the intention of the Legislature is to prevail, and that intention is to be collected from the whole of the law, and the circumstances which produced it.

The case is to be considered, 1st. What was the intention of the Legislature? 2d. Have they used clear words to express that intention? 3d. What is the effect of the enacting clause, and does it carry their intention into effect?

The motive does not satisfactorily appear; but facts do appear in the petition, as recited in the Act, which are, that the land would, by the will, vest in Thomas; that Leonard had no son, but he had daughters who could not inherit; that he had improved the land, and had a solicitude to provide for his daughters. It is apparent to the Court, that Leonard had little or no expectation of having any other children; he had in view to provide for the children he then had. Thomas, his brother, knowing of the improvements made on the land by Leonard, and actuated by motives of affection, concurred in the petition. It appears that the operation under the will was intended to be suspended. The petition sets forth, that Leonard had "only female heirs, who could not inherit." This was nothing more than a description of the persons who were to take under the law. The prayer of the petition was "to vest in the female heirs"

of Leonard Hollyday, in fee simple. "Female heirs" meant the two daughters of Leonard Hollyday, and that the estate was to vest immediately in them. It appears that the petition had in view to provide for the two daughters. The Legislature granted the petition. Has the enacting clause carried the intention into effect? "shall be and are hereby vested in the said female heirs." The intention must be to vest the estate in the daughters then in being. It is a plain designation of the persons who were to take; and that an estate in fee simple should be \* vested in the two daughters, **172** to be defeated only upon the happening of two contingencies. If the events, or either of them, had happened, the estate in fee simple would have divested, and let in the operation of the will. This shows, that by the Act there was to be a suspension of the estate. It was the act of the father providing for his children, with a proviso in case of male heirs, or the death of his daughters without issue. Thomas made a greater sacrifice than Leonard.

What would be the effect if the construction contended for on the other side was to prevail? It would be putting it in the power of one party to defeat the provisions of the Legislature. Such a construction could never be admitted. The children of Leonard Hollyday, (the third,) never could have inherited under the will.

The Court are of opinion, that an estate in fee simple vested in the two daughters of Leonard Hollyday, which estate was to be defeated and divested out of the daughters, on the happening of either of two contingencies.

First. If Leonard Hollyday, (the second,) left issue male at the time of his death.

Second. If Leonard Hollyday should die without leaving issue male at the time of his death, and his two daughters should die without leaving issue.

On the happening of either of said events, the estate in fee simple, which was created in the two daughters, was to be divested, and the limitations in the will, which were suspended by the Act of the Legislature for the purpose of providing for his two daughters, were to be again put in operation. And the Court are of opinion, that the plaintiff is not entitled to recover the land. The plaintiff excepted.

2. The defendant then read in evidence a deed of mortgage from Leonard Hollyday, (the third,) to Benjamin Mackall, bearing date the 2d of April, 1791, for the tract of land called Buzzard Island, in the declaration mentioned, to secure the payment of £2,179 14 1, current money, with interest, on the 1st of September, 1794; and he prayed the opinion of the Court, and their direction to the jury, that the plaintiff was not competent to recover by reason of the mortgage, unless he could show that the mortgage \* had been satisfied previous to the time of bringing this ejectment. **173**

CHASE, Ch. J. The Court are of opinion, that the mortgage created a legal estate in the land in Benjamin Mackall, the mortgagee, and his heirs; and that the plaintiff cannot recover unless he proves the mortgage was satisfied previous to the bringing this ejectment. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before TILGHMAN, BUCHANAN and NICHOLSON, JJ.

*Martin and Shaafl*, for the appellant, on the first bill of exceptions, stated, that the question for discussion arose wholly out of the Act of Assembly of 1756, ch. 17, and three different constructions of that Act they contended for in opposition to the opinion of the Court below—1. That Leonard, (2d,) still continued tenant in tail, as before, with a limitation to his female heirs in case of his dying without issue male, with power of alienation, &c. and that his deed to Leonard, (3d,) of the 1st of February, 1791, barred the estate tail, and vested a fee in the grantee. 2. Or, that the Act gave the estate beyond the control of the tenant, to such persons as at the time of the death of Leonard, (2d,) answered the description of his heirs female, as purchasers, including all those who, at his death in 1794, would have been his heirs female, viz. his two daughters, Mrs. Johns and Mrs. Cox, and also his grand-daughters, the children of Leonard, (3d.) 3. Or, that the Act gave the estate beyond the control of the tenant to such persons, as, according to the meaning of the terms when the law passed in 1756, answered the description of heirs female of Leonard, (2d;) that is, females who were heirs also, viz. the daughters, the heirs of Leonard, (3d.) They cited *Shelley's Case*, 1 *Coke*, 102, 103; *Shep. T.* 103; *Chew's Lessee vs. Weems*, 1 *H. & McH.* 463. (a)

\* On the second bill of exceptions, they contended, that where the title to land is contested between the mortgagor **174** and a stranger, the latter cannot set up the mortgage to defeat the recovery. *Pow. on Mort.* 221, 222; *The King vs. St. Michael's, Dougl.* 632; *Lade vs. Holford*, 3 *Burr.* 1416; *Doe vs. Bristow & Pegge*, 1 *T. R.* 758, (note.)

*Key, Mason, and Johnson*, (Attorney-General,) for the appellee, on the first bill of exceptions, contended, 1. That the inheritance and estate was immediately vested in the daughters in fee by force of

(a) In *Chew's Lessee vs. Weems*, notwithstanding the decision of the Court of Appeals, a new ejectment was brought after the Revolution, in 1778, and the General Court, at October Term, 1782, gave the same judgment, which had been given by the Provincial Court, from which there was also an appeal by the plaintiff to the Court of Appeals, but that appeal was not acted on, the case having been entered agreed at May Term, 1783. See also 3 *Atk.* 198; *Mod.* 422; *Cro. Eliz.* 525; *Pollexf.* 645; 2 *Str.* 1175; 8 *Atk.* 390, 408; 1 *Wils.* 140; 2 *Ves.* 249; 3 *T. R.* 470; 2 *Atk.* 646; 1 *P. Wms.* 430; 1 *Ves.* 217.

the clear words of the Act of Assembly. 2. That if the estate did not immediately pass to the daughters, the inheritance in fee was vested in them, subject to a life estate in their father, and liable to be divested from them on the father's death, leaving a male heir then living. 3. That if the inheritance in fee was not vested in the daughters on the passage of the law, it was an executory grant to vest on a contingency to happen within a life in being, and like an executory devise not capable of being barred by deed or common recovery. They cited *Wheatley vs. Thomas*, 1 *Lev.* 75; *Walker vs. Collier*, *Cro. Eliz.* 379; *Co. Litt.* 27 a; *Prince's Case*, 8 *Coke*, 1; *Murray vs. Eyton & Price*, *T. Raym.* 355; *Shep. T.* 108, 109, 119; *Pow. on Cont.* 336, 337, 376, 377; *Pow. on Dev.* 376, 377.

On the second bill of exceptions, they cited *Doe vs. Wharton & Dixon*, 8 *T. R.* 2; *Doe vs. Staple*, 2 *T. R.* 696; *Armstrong vs. Peirse et al.* 3 *Burr.* 1901.

The Court concurred in the opinions expressed by the General Court, in both of the bills of exceptions, and

*Judgment affirmed.*

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#### TOLSON'S LESSEE vs. LANHAM.

A grant of land is to be construed most favorably for the grantee. (a)

Land included in a grant, but excluded from the certificate of survey on which the grant issued, cannot be taken up as vacant land.

A grant of land cannot be corrected or controled by the certificate of survey, but will pass the land comprehended within the courses and distances expressed in the grant.

If a grant is for more land than is contained in the certificate of survey, it may be vacated in the Court of Chancery; and if it is for less land, the grantee's remedy, if any, is in equity. (b)

APPEAL from the General Court. Ejectment brought by the appellant for a tract of land called Tolson's Enlargement, **175** \* lying in Prince George's County. The following case was stated for the opinion of the Court. A tract of land called Hunter's Folly, was surveyed on the 29th of November, 1706, for William Hunter, as by the certificate thereof exhibited, and by which it was described as "beginning at a bounded Spanish oak, and running S.

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(a) See *Helms vs. Howard*, 2 H. & McH. 35, note (g).

(b) In *Hoffman vs. Johnson*, 1 Bland, 109, it is said that every patent for land from the State binds the State to warrant and assure to the grantee, and those who claim under him, that the tract described shall contain the number of acres specified. The remuneration for deficiency in quantity is not, however, pecuniary, or made by refunding the purchase money; but it is made in kind, in other land warrants, or by an authority to take other vacant lands anywhere to the amount of the deficiency.



75° E. 84 ps. N. W. 159 ps. then N. 74° E. 160 ps. then N. W. 280 ps. to a black oak bounded, then S. 21° W. 185 ps. then with a straight line to the first boundary, containing and laid out for 334 acres of land more or less." A patent issued on this certificate the 10th of June, 1708, for the tract called Hunter's Folly, describing it as "beginning at a bounded Spanish oak, and running S. 75° E. 84 ps. then N. 25° E. 84 ps. then N. W. 159 ps. then N. 74° E. 160 ps. then N. W. 280 ps. to a black oak, then S. 21° W. 185 ps. then with a straight line to the first tree, containing and laid out for 334 acres of land more or less, according to the certificate of survey thereof taken and returned into our land office, bearing date the 29th of November, 1706." The tract called Tolson's Enlargement for which this suit was instituted, is not included in the certificate of survey of Hunter's Folly, but is included in the patent which issued on the certificate; it being admitted that there is a variance between the certificate and patent, and that the latter comprehends more land than the former. The lessor of the plaintiff, before the institution of this ejectment, took up the land, in the declaration of ejectment mentioned, as vacant land not included in the certificate of survey of the tract called Hunter's Folly, and he duly obtained a patent for the same.

CHASE, Ch. J. The question is, whether the land mentioned in the declaration was not liable to be taken up as vacancy, it being excluded by the certificate of survey of Hunter's Folly, but included within the courses expressed in the patent for the said land? Whether the defendant can hold more land under his grant than what is comprehended in the certificate of survey?

The Court are of opinion, that the grant is to be construed most favorably for the grantee. The Lord Proprietary could not grant what had already passed from him, without first going into Chancery to vacate the former grant; \* and had less land passed by the patent than was contained in the certificate, the defendant's remedy, if any, must have been in equity. **176**

Judgment was entered for the defendant, and the plaintiff appealed to this Court, where the case was argued before TILGHMAN, BUCHANAN, and GANTT, JJ. by

*T. Buchanan*, for the appellant, and *Mason*, for the appellee.

*Judgment affirmed.*

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NEGRO JAMES *vs.* GAITHER.

Parol evidence is not admissible to prove that a deed of manumission was attested in the presence of two witnesses, only one having signed the same.

A deed of manumission under the Act of 1752, ch. 1, s. 5, executed in the presence of only one witness, will not operate to give freedom to the slaves mentioned therein. (a)

APPEAL from the General Court. The petitioner, (now appellant,) filed his petition for freedom in Anne Arundel County Court. The case was this—A deed of manumission, dated the 13th of September, 1784, was executed by B. Gaither, deceased, then of Prince George's County, giving freedom, after his death, to sundry of his negro slaves, among whom was the petitioner, Negro James. The deed was signed and sealed by him in the presence of, and acknowledged before T. Boyd, one of the justices of the peace for Prince George's County, on the 13th of September, 1784, and recorded in the records of that county on the 27th of November, 1784. Gaither by his will, dated the 20th of June, 1791, devised and bequeathed as follows: "Item. I give and devise to B. Ijams all my land whereon I now dwell, and my several tracts or parcels of land adjoining thereto; also all my personal estate, except my negroes, and to his heirs and assigns for ever." "Item. My will and desire is, that all my young negroes, born since my negroes were recorded, shall be absolutely free at my death." The inventory, returned on Gaither's estate, does not include any of his slaves. Ignatius Allen, a witness sworn in the cause, deposed that he lived with Gaither at the time he sent for T. Boyd to take the acknowledgment of a deed to set his negroes free; that Boyd came and drew the deed; that after it was drawn, Gaither did sign, seal, and acknowledge the same as his act and deed, and did deliver the same to Boyd, requesting him to have it recorded. That when Gaither executed and signed the deed he was confined to his bed; that he called \* upon the witness to assist him in  
**177** getting up in his bed to sign the deed; that the witness accordingly did assist to raise Gaither in his bed, and that he stood by and was present, and did see Gaither sign the deed, and acknowledge it as his act and deed; and also saw Boyd sign the same as a witness thereto. That Gaither asked Boyd if it was necessary that any one else should sign it, and Boyd replied it was not. That Gaither and Boyd both observed then, that there were several who

(a) In *Young vs. State*, 7 G. & J. 262, where it was held that the failure of the Justices of the Orphans' Court to attest a sheriff's bond was no objection to its validity, the Court said that the case in the text was clearly distinguishable. "The Act of 1752, in requiring two witnesses to attest deeds of manumission, designed to surround those acts with this form and solemnity that slave-holders might be guarded against the execution of hasty inconsiderate deeds of manumission. To have given efficacy to such a deed, by a single witness, would be to deprive the master of the protection with which the law had surrounded him contrary to the manifest intent of the Legislature. In the case before us, the securities of the sheriff seek to be absolved from all liability on their bond, by reason of the omission of a ceremony prescribed, not for their protection, but to render them more securely bound."

also saw him sign; that Gaither requested the persons who were present, to wit, Benjamin Ijams, (who has left the State,) and Sarah Ijams, (who is since dead,) and also the witness in particular, all to take notice that he had signed an instrument of writing to set all his negroes free. The witness lived with Gaither eight or nine years after the deed was executed, and frequently heard him declare that all his negroes would be free at his death, as he had them recorded in Court. That the witness cannot write his name, and did not sign the deed as a witness. That Robert Waters, another witness also sworn in the cause, deposed, that at the request of Gaither he went to draw his will, it was late in the evening, and the witness objected doing it that evening, because he alleged it was too late; but on Gaither's saying it would be short, if he agreed to draw it. That Gaither told him he had deeded his negroes to be free at his death, and that the deed had been recorded several years. That after the witness had drawn the clause in the will in favor of B. Ijams, he told the witness to draw a clause in favor of some young negroes, and when the witness began, he told him to stop, and said it was hardly worth while, the old ones he had deeded free at his death, and the deed had been recorded for several years, and the young ones will be free, if not named in the will. But after some pause he said, however, you may do it, and do it in this way, all my young negroes, born since my negroes were recorded, to be free at my death. The clause was then wrote as stated in the will, dated the 20th of June, 1791. That Gaither died about the year 1793, and the negroes mentioned in the deed have been at large ever since, That he never heard that any one entitled to Gaither's estate ever set up any claim to the negroes, until about two years ago. The County Court, \* [H. RIDGELY, Ch. J.] at April Term, 1802, gave judgment for the petitioner. The defendant appealed **178** to the General Court; and at May Term, 1804, the General Court [CHASE, Ch. J. DONE and SPRIGG, JJ.] reversed the judgment of the County Court, and gave judgment that the appellee, the petitioner, was a slave. On an appeal to this Court by the petitioner, the case was argued at the last term before TILGHMAN, NICHOLSON, and GANTT, JJ.

*Key*, and *Johnson* (Attorney-General,) for the appellant, referred to the *Stat. of Frauds*, 29 Car. II, ch. 3, s. 5; *Co. Litt.* 283 a; *Jacob's L. D. tit. Evidence*; *Windham vs. Chetwynd*, 1 Burr. 414; 2 Eq. Ca. Ab. 345, case 15; *Gitting's Lessee vs. Hall*, 1 H. & J. 14.

*Shaaff* and *T. Buchanan*, for the appellee, also referred to the Act of 1752, ch. 1; *Shaffer's Lessee vs. Corbett*, 3 H. & HcH, 513; *Ridgely vs. Howard et al. Ibid.*, 321; and the Act of 1796, ch. 67.

*Curia adv. vult.*

At this term,

*Judgment affirmed.*

## 179

\* CONTEE *vs.* COOKE.

On a bill in Chancery to be relieved against a verdict and judgment, it appeared that the application in effect was, that the Chancellor act as a tribunal of appeal from the verdict. There was stated no surprise on the complainant whilst defendant at law; no discovery of testimony since the trial, and no sufficient proof of fraud. Decreed, that the facts set forth in the bill were not sufficient to warrant the Court to interpose and grant the relief prayed. (a)

Where certain circumstances, with the testimony of one witness, were not sufficient to refute the defendant's answer.

APPEAL from the Court of Chancery. The appellant, by his bill of complaint filed on the 24th of April, 1800, stated that Richard Wootton, on the 5th of August, 1791, assigned to him, for a valuable consideration, a bond executed by Benjamin Burgess, (since deceased,) and by Thomas Tongue, his security, dated the 21st of April, 1789, conditioned for the payment of £301 12 9 current money. That suits were commenced on the bond in the General Court, and a judgment was obtained against Tongue at May Term, 1793; but Burgess, dying before the judgment Court, leave was given to issue a summons against Agnes Burgess, his administratrix. That the complainant was frequently applied to by B. Burgess, in his lifetime, to resort to Thomas Lane for payment, against whom Burgess had a judgment, obtained in the name of Richard Harwood for his use, in the General Court at October Term, 1790. B. Burgess, as the complainant understood, was much involved in debt, and alleging that he wished to pay by this judgment, the complainant was induced so far to comply with his request as to go to Lane, and to put himself to some inconvenience, expense and trouble, to receive tobacco and cash, to be applied towards payment of his claim against Burgess. That the complainant received a letter from Burgess, dated the 16th of October, 1792, requesting him to meet at the house of Lane on the Thursday then next, to settle. That the complainant accordingly met, and received from Burgess, which he had received from Lane, and paid to the complainant, 1,637 lbs. of tobacco at 35s. per hundred, and £74 6 1 cash, which was by mistake calculated to make together the sum of £104 16 6, for which he gave Burgess a receipt, dated the 23d of October, 1792, and for which

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(a) Equity will not relieve against a recovery in a trial at law unless the justice of the verdict can be impeached by facts or on grounds of which the party seeking the aid of Chancery could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with any negligence or fault on his own part. *Gott vs. Carr*, 6 G. & J. 309; *Ewing vs. Nickle*, 45 Md. 412; *Kearney vs. Sascor*, 37 Md. 264.

sum Burgess also gave a receipt to Lane. That the complainant, on his return home on the 25th of the same month, entered the payment on his day-book as of that date, as it was his custom to do on his store books when he received money during his absence from home; but that it was entered for the correct amount of the money and tobacco, to wit, £103 16 6. That the complainant, after discovering the mistake, and wishing to furnish a statement of his account, sent his account against Burgess and Tongue, in which he charged them \* with the sum due on the judgment, and credited them, under the date of the 25th of October, 1792, with the **180** quantity of tobacco and cash, under the heads of tobacco account and cash account, amounting together to the sum of £103 16 6; but he expressly alleges, that the sum for which he gave the receipt, and the sum which he gave credit for in the account rendered, were for the same tobacco and money, and were one and the same, except the mistake in the calculation, and that he never did receive both sums separately, nor any further sum in the month of October, 1792, more than is credited in his account against Burgess and Tongue. that is to say, £103 16 6, from Burgess and Tongue, or any one on their account or behalf. That Burgess relied entirely on Lane for payment of this judgment to the amount of his judgment against Lane; that he was not in circumstances to make payment himself without difficulty, and that he never was in the habit of making several payments in so short an interval, to the complainant's knowledge. The complainant states, that another payment was made to him in February, 1793, by the purchase of a negro man from Lane, for £79 18 9; and that Burgess, in his life-time, never set up or claimed a credit on the receipt, and on the account rendered also, as separate payments, but acquiesced in the balance, as stated by the complainant; and the complainant does not believe that he left any paper or memorandum specifying such a claim. That after the death of Burgess, which happened before December, 1793, he received from his widow, Agnes Burgess, (now Agnes Cooke, the defendant,) on the 10th of December, 1793, as appears by her account, the sum of £51, by the purchase of a negro boy at a public sale of her intestate's property, which was done by him to accommodate the administratrix. The complainant was applied to at the sale to consent to the property being sold on a credit, which he agreed to for the benefit and convenience of the administratrix. That he afterwards, on the 25th of March, 1795, received from Tongue, the security, the sum of £37 9 0, and from Lane, in August, 1795, the further sum of £153 7 2. The complainant admits that the several sums amounted together to £9 13 8 more than the balance due on the judgment against Lane, out of which the complainant was to be paid, but he alleges that they were not all received by him on account thereof, but that he had an **181**

\* order from Bishop Claggett to collect and receive from Agnes

Burgess a sum of money due on a judgment to Claggett, on which account he also received afterwards from Charles Cooke, (who intermarried with Agnes Burgess,) tobacco and money to the amount of £50 4 0, as appears by an account exhibited, by which a balance appears to have been due from the complainant of £1 10 5½, which he has been and still is ready to pay. That after the intermarriage of A. Burgess with Cooke, the personal estate of B. Burgess, being insufficient for the payment of his debts, and Thomas Tillard having a claim against the estate, they put into his possession the papers belonging to the estate, with a view to his discovering any debt that might be due thereto, and the complainant received from Tillard a letter dated the 29th of October, 1795, stating that a balance was still due from the complainant on the sum received for Lane's judgment of £20, and desiring payment thereof; but the complainant not admitting the sum to be due, refused to pay the same, and afterwards a suit was instituted in the General Court by Cooke, and Agnes his wife, against the complainant, for money had and received, in order to recover back the sum alleged by them to be overpaid. That Cooke and wife rendered to the complainant an account made out by Tillard; the charges in which account of £103 16 6, £79 18 9, £50 5 0, £37 9 0, and £153 7 3, are the same as those above admitted by the complainant, but he expressly alleges that the charge of £15 5 6, charged by them in the account, was for a hogshead of tobacco received by him on a judgment by A. and B. Contee against B. Burgess; and that the charges in their account of £104 16 6, and £103 16 6, are for one and the same payment in the manner above stated. That while the suit against him was depending, the papers of the plaintiffs at law were by their counsel delivered to the counsel of the complainant, (the defendant in the suit,) to examine, and were by him given to A. Contee, who took a copy of the account, and returned all the papers to the plaintiff's counsel. The complainant expressly declares, that he delivered to his counsel a receipt which he, the complainant, had obtained from Barbara Lane, one of the executors of T. Lane, which was a receipt from B. Burgess to T. Lane for the said sum of £104 16 6, or near that sum, for which the complainant had given to B. Burgess a receipt dated the 23d of October, \* 1792. That the complainant's counsel, William Cooke, Esquire, left the Court before the expiration of October Term, 1799, and (before the complainant saw him that term,) engaged other counsel, to wit, William Kilty, Esquire, and put the papers into his hands, informing him that some of them belonged to the plaintiffs; and the complainant is informed and believes, that the counsel for the plaintiffs, John T. Mason, Esquire, had access to the papers in the hands of William Kilty, Esquire, and took therefrom such as he alleged to belong to his client. But at the trial Court the receipt for £104 16 6, or near that sum, was not to be found, nor the account drawn off by Tillard; on which

Mr. Mason, on the trial, declined at first to act as counsel, but employed another attorney, intending to give testimony as to the papers; but the complainant not knowing what was become of the papers, and wishing for nothing more than a fair trial, admitted that such papers had existed, to wit, a receipt from him to B. Burgess, and also from B. Burgess to T. Lane, for £104 16 6, or near that sum, dated the 23d of October, 1792, and an account drawn off by Tillard. That at the trial the deposition of Barbara Lane, taken by consent, was read, in which she stated that the complainant had procured the last mentioned receipt from her, the purport of which she did not know, and that the same had not been returned, and that that circumstance, and the loss of the other papers, was artfully and unjustly made use of in argument to injure the complainant's character, and to influence the determination of the jury. The complainant solemnly declares that he did not wish or design, nor did he know that any of the papers were missing or lost before he came to the trial Court, October Term, 1799, and when he was informed the papers were wanting, he admitted of such papers having existed. He was at Court several days, and at length was so much indisposed, that he left the Court, and was informed the trial came on next day when he was absent. The complainant is informed that Tillard was examined as an evidence for the plaintiffs, having declared, when examined on the *voir dire*, that he was not interested in the event of the suit, although he declared in the course of his testimony that he had a claim on the estate of Burgess, and had obtained an order to receive what might be due from the complainant in payment thereof, which \* appears by his letter to the complainant of the 29th of October, 1795. That evidence was also given at **183** the trial of the above mentioned payments in tobacco and money, which were never made, in discharge of the judgment by Bishop Claggett, and of the tobacco due to A. and B. Contee on judgment, which the complainant had no means of proving, the application thereof resting solely in the knowledge of the plaintiffs; and that a verdict, on the trial, was given in favor of the plaintiffs, for the sum of £203 4 6 current money, damages, and \$15 and 1,324 lbs. of tobacco, costs. The complainant states, that he is well convinced that the claim aforesaid would never have been brought against him if B. Burgess had lived, for he believes, that so far from there being any account or papers left by him to prove the justness of the claim, his books and papers, if produced, would show that no such claim existed, and that the judgment has been unjustly recovered. Prayer for an injunction, and relief, &c. The accounts and judgments referred to in the bill were all exhibited. The Chancellor granted an injunction agreeably to the prayer of the complainant. The answer of Agnes Cooke, (Charles Cooke, her husband, against whom and his wife Agnes, the bill was filed, having since died,) admitted the bond executed by B. Burgess, &c. That in discharge of the bond,

on the 15th of April, 1792, there was paid in tobacco, valued at 32s. 6d. pr. cwt. the price agreed on, and including the cask, the sum of £15 5 6, and on the 23d of October, 1792, by B. Burgess, the sum of £104 16 6, for which he obtained the receipt of the complainant. That Lane was indebted to Burgess, and that Lane, at the request of Burgess, on the 25th of the same month and year, in discharge of the claim, paid in money and tobacco the sum of £103 16 6; that Lane also paid on the 25th of February, 1793, the sum of £79 18 9, leaving a balance due on the 10th of December following in favor of the complainant, and including interest, the sum of £74 15 8. That after the death of B. Burgess, and before she obtained a true knowledge of the transaction, and had ascertained the sum due, the following payments were made, to wit, £50 5 0 for a negro boy sold to the complainant on the 10th of December, 1793, £37 9 0 paid him on the 25th of March, 1795, and £153 7 3 on the 29th of August, 1795, and which payment she afterwards discovered \* greatly

**184** exceeded the balance due the complainant from her deceased husband. That she knows no other claim of the complainant on Burgess' estate, either in his own right, or as the assignee of any other of his creditors, and that the different payments were made in discharge of the above mentioned debt; that the complainant, when it was discovered he had been overpaid, did not refuse to refund on the ground that he had other claims, but because he alleged that he had not received the two sums of £103 16 6 and £104 16 6; that the defendant to obtain back the money which had been unjustly paid, was obliged to bring suit in her name, and in the name of Charles Cooke her husband, and at October Term, 1799, by the verdict of a jury obtained a judgment for the sum of £203 4 6, that being the sum, including interest, which had been overpaid and exceeding any just claim of the complainant. That she is informed that any defence the complainant had against her demand, either because he was charged with more money than received, or that the money was to be applied to other claims due him in any capacity whatever, were subjects for the decision of the Court and jury, and the defendant, to support her claim there, was obliged to resort to disinterested evidence, according to the rules of law; that the complainant had there every advantage the law recognizes of objecting to evidence, and cannot here, because he alleges improper evidence was received, defeat the effect of the verdict. She knows of no other claim by the complainant against her husband's estate, to which he had a right to apply any of the payments; she trusts that a Court of equity will not, after an administratrix had paid moneys supposing them due, when it is discovered they were not due, and when a verdict and judgment are obtained for the same to be refunded, prevent her from obtaining the benefit of such verdict and judgment. A general replication was entered to the answer; and the injunction, on the motion of the defendant, was dissolved by the



Chancellor on the 15th of February, 1803. A commission issued, under which testimony was taken, and the accounts between the parties were stated by the auditor.

The testimony taken was that of David Weems, who deposed that Charles Cooke who married the widow of B. Burgess before the institution of the suit by him and wife against Contee, came to the deponent, and asked him to \* assist him in stating an account against Contee, but before they began to state the account, **185** he related some circumstances in this manner, that they had Contee's receipt for £104 odd shillings, and also Contee's account, wherein there was a sum credited of about 20 shillings less than the receipt expressed, two days after the date of the receipt, which two sums he said were but one payment agreeably to the information he had received from his wife. From that information the deponent refused to have any thing to do with it, or any hand in stating the account. In the course of conversation with Cooke, he objected to a sum charged in the account by Contee for commission; that on his account against Contee the balance was over £15, but he would take 40 dollars, and give a full discharge for the same.

The case being argued by the counsel concerned,

HANSON, C. at June Term, 1804, by his decree states that "it appears to him that the application of the complainant in effect is, that the Chancellor act as a tribunal of appeal from the verdict of a jury. There is stated no surprise on the complainant, whilst defendant at law; no discovery of testimony since the trial at law. There is no sufficient proof of fraud. As to that part of the deposition which has been considered as evidence of fraud, there is the answer of a defendant denying it; and the established principle of equity, respecting answers which defendants are compelled to give, is well known." Decreed, that the bill of the complainant be dismissed but without costs. From this decree the complainant appealed to this Court.

The cause was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, and GANTT, JJ.

*T. Buchanan, and Magruder*, for the appellant, contended, 1. That the Court of Chancery might decree against the answer upon the testimony of one witness, where there were circumstances concurring with the testimony. They cited 1 *Harr. Chan. Pr.* 106; *Sudg. L. V.* 504; *Arnot vs. Bisco*, 1 *Ves.* 97; *Le Neve vs. Le Neve*, 3 *Atk.* 650; *S. C.* 1 *Ves.* 66. 2. That a Court of Chancery might relieve against a verdict and judgment, where injustice had been done at law. *Countess of Gainsborough vs. \* Grifford*, 2 *P. Wms.* 426; 2 *Eq. Ca. Ab.* 245; *Bunb.* 178; *Kent vs. Brigman*, *Pre. in Chan.* 233; *Ambler vs. Wyld*, 2 *Wash. Rep.* 36; *M'Rae vs. Woods*, *Ibid.* 80; *Cochran vs. Street*, **186** 1 *Wash. Rep.* 79; 3 *Morg. Ess.* 90; 2 *Morg. Ess.* 16.

*Johnson* (Attorney-General,) for the appellee, referred to *Gover vs. Christie & Jay*, ante 67;) and *Garretson vs. Cole*, 1 H. & J. 370.

CHASE, Ch. J. delivered the opinion of the Court. The Court are of opinion, that the facts set forth by the complainant in his bill of complaint, are not sufficient to warrant the Court of Chancery to interpose and grant the relief prayed by complainant.

*Decree affirmed.*

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GRANT vs. RIDSDALE *et al.*

D. G. in a letter of credit to R. and B. in favor of H. and G. used the following expressions: "I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house." Held, that the guaranty was an absolute one, and to continue until countermanded by D. G. (a)

Where the judgment of the General Court, after a general verdict in *assumpsit*, was reversed, because of a defective count in the declaration.

*Procedendo* awarded where the Court of Appeals concurred with the Court below in the opinion expressed in the bill of exceptions, but reversed the judgment, because of a defective count in the declaration.

APPEAL from the General Court. This was a special action of *assumpsit* upon a special guarantee for goods sold and delivered to Hacket and Grant, brought by the appellees, (the plaintiffs in the Court below,) against the appellant. The declaration contained the following counts: 1. That the plaintiffs, on the 1st day of February, 1799, at the special instance and request of the defendant, had before that time sold and delivered to John Hacket and Alexander Grant divers goods, wares and merchandises; the defendant, in consideration of the same, afterwards, &c. assumed upon himself, and to

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(a) In *Hutton vs. Padgett*, 26 Md. 228, where the defendant was sued on the following guaranty: "I hold myself responsible to A. &c. to the amount of \$2,000 for any drafts they have accepted, or may hereafter accept, for L." it was held that to bind a party upon a collateral promise to answer for the debt of another it is necessary, under the Statute of Frauds, that the consideration, as well as the promise, should appear from the writing: that it is not necessary, however, that the consideration should be stated in express terms, but it is sufficient if it may be implied with certainty from the instrument itself; and that the plain meaning of the contract in this case was that in consideration that A. would accept for L. the defendant would be responsible to A. for the payment of subsequent acceptances to the amount of \$2,000. This was a legal consideration. But where the consideration for a promise to guarantee the debt of another was the forbearance of the creditor to attach the goods of his debtor, and the proof showed that there was no ground for the process of attachment, it was held that there was an utter failure of consideration for the promise. *Smith vs. Easton*, 54 Md. 138.

the plaintiffs then and there faithfully promised, that he would well and truly pay to them as much money as they reasonably deserved to have for the goods, wares and merchandises, so sold and delivered to J. H. and A. G. And the plaintiffs aver, that they reasonably deserve to have for the goods, wares and merchandises, so sold and delivered to H. and G. the sum of £2,000 current money, whereof the defendant afterwards, &c. had notice. 2. That the plaintiffs, on the &c., had (at the special instance and request of the defendant before that time, &c., made to the plaintiffs by the defendant,) sold and delivered to J. H. and A. G. divers other goods, wares and merchandises; the defendant, afterwards, &c., \* in consideration of the same, assumed upon himself, and to the plaintiffs then and **187** there faithfully promised, that he would well and truly pay to them as much money as they reasonably deserved to have for the said goods, wares and merchandises, in case H. and G. did not thereafter pay and satisfy the plaintiffs therefor. And the plaintiffs aver, that they reasonably deserved to have for the goods, wares and merchandises, last mentioned, the sum of £2,000 current money, to wit, &c. of which H. and G. and the defendant, afterwards, &c. had notice. And the plaintiffs further aver, that H. and G. although often afterwards, &c. thereto requested by the plaintiffs, have not paid in any manner, contented or satisfied, the said sum of money, or any part thereof, to the plaintiffs, but have wholly refused to pay the same to them, and still do refuse, and have become wholly unable to pay the same, and are bankrupts and insolvent, to wit, &c. Of all which the defendant afterwards, &c. had notice. 3. That H. and G. on, &c. were about to purchase and buy of the plaintiffs certain other goods, &c. to wit, &c. the defendant undertook, and to the plaintiffs did then and there faithfully promise, that he would well and truly pay to the plaintiffs as much current money as they deserve to have for the goods, &c. if the plaintiffs should sell and deliver the same to H. and G. and they should fail in making payment therefor. And the plaintiffs aver, that in consideration of the promise and undertaking of the defendant, in form aforesaid made, they did afterwards, &c. sell and deliver to H. and G. the said goods, &c. which said goods, &c. were at the time of the said sale and delivery thereof, to wit, &c. worth, and the plaintiffs deserved to have therefor, other sum of £2,000 current money; of all which premises H. and G. and the defendant, afterwards, &c. had notice. And that the defendant, in consideration of the premises, afterwards, &c. assumed upon himself, and to the plaintiffs then and there faithfully promised that he would well and truly pay to them the said sum of £2,000 current money, whenever he should afterwards be thereto requested. 4. That the plaintiffs, had on, &c. bargained and agreed to and with H. and G. for the purchase of certain other goods, &c. by them, H. and G. of the plaintiffs to be then and there made, for the price and sum of other £2,000 current money; the defendant then and there, to wit, on, &c. assumed upon himself, and to

**188** the plaintiffs then \* and there faithfully promised, that if they would deliver the said goods, &c. to H. and G. he the defendant would well and truly pay to the plaintiffs the said sum of £2,000 current money, in case H. and G. should be unable to pay for the same, or refuse to pay therefor. And the plaintiffs aver, that they, in consideration of the premises, afterwards, &c. did sell and deliver to H. and G. the said goods, &c. for the sum of £2,000 current money, of which the defendant then and there had notice. And the plaintiffs aver, that H. and G. although often afterwards thereto requested by the plaintiffs, to wit, on, &c. have hitherto wholly refused to pay the said sum of £2,000 current money, and do still refuse, and are become bankrupt, insolvent, and unable to pay the sum of money last mentioned, or any part thereof; by reason whereof the defendant became liable to pay to the plaintiffs the sum of money last mentioned; and being so liable the defendant, in consideration thereof, afterwards, to wit, on, &c. upon himself assumed, and to the plaintiffs then and there faithfully promised to pay them the sum of money last mentioned, when afterwards he should be thereunto requested. Nevertheless, &c. The general issue was pleaded; and at the trial at May Term, 1803, the following facts were proved to the jury: That one of the Mr. Beaumonts of the house of Ridsdale & Beaumonts, the plaintiffs, was, previous to the 6th of April, 1795, in the United States, and among other places, in the City of Baltimore, where the defendant then resided, and where the house of Hackett and Grant was established, soliciting orders for merchandise from his house; that the defendant wrote the following letter, on the day on which it is dated, and sent the same by his son Alexander who went to England with a view of establishing connections in the commercial line there with the different manufacturers, and others.

“Baltimore, 6 April, 1795.

Messrs. Ridsdale and Beaumont, Gentlemen—By the recommendation of Mr. Beaumont, I take the liberty to address you by my son Alexander, who visits England with a view of establishing connexions in the commercial line there with the different manufacturers, and others. He is concerned with Mr. John Hacket of this place, under the firm of Hacket and Grant. For their plan, I refer to themselves; have, therefore, only to add, that I will guarantee their engagements, should you think it necessary, \* for any transac-

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tion they may have with your house. I am, &c.

DANL. GRANT.”

Alexander Grant was one of the house of Hacket and Grant; and he arrived in England some time before the 30th of July in the said year, and delivered the letter to the plaintiffs, who, by the directions of A. Grant, after his arrival in England, and while there, shipped on the 30th July in said year, to the house of H. & G., goods to the amount of £1,560 0 10 sterling. Afterwards, and some time in the fall of the said year, A. Grant returned to Baltimore, and in conse-

quence of orders sent by H. and G. and before A. Grant went a second time to England, the plaintiffs shipped goods to H. and G. to the amount of £1,103 7 0 sterling, to wit, on the 18th of February, 1796; and also that A. Grant went a second time to England, and arrived there some time before the 23d of June in the year last mentioned, on which day the plaintiffs, by the directions of H. and G. and while A. Grant was in England, shipped to H. and G. other goods to the amount of £689 9 8 sterling; and that the account which they produced contains a correct statement of the mercantile transactions between the plaintiffs and H. & G. and that the balance there stated, of £707 7 2, was justly due to the plaintiffs from H. and G., who on the 30th of April, 1798, acknowledged the account to be correct, and signed the same. It was further proved that H. & G. are insolvent. No evidence was given that the plaintiffs returned any answer to the defendant's letter, or that any other correspondence took place between the defendant and the plaintiffs, at any time before the 30th of April, 1798. The plaintiffs further proved, that immediately after having liquidated the account with H. and G. they required payment of them, which H. and G. declined and refused, alleging, that they were unable to pay the same; of which application and refusal immediate notice was given to the defendant by the plaintiffs, and a demand of the debt was made by them of him, who requested time to consider thereon, and advise with counsel, and afterwards gave for answer, that he would not pay the debt. The plaintiffs further proved, that after various applications to H. and G. and to the defendant, they instituted a suit on the 6th of March, 1799, in the General Court for the Western Shore, \* against H. and G., and at October Term, 1800, obtained judgment against them, and afterwards issued an execution against them; from which execution they were discharged by an order of the Chancellor, under an insolvent law passed in 1800. The plaintiffs then applied to the Court, that they would direct the jury, that upon the facts so proved and given in evidence, the defendant was answerable as the guarantee of Hacket and Grant, and that the plaintiffs were entitled to their verdict for the balance due. **190**

CHASE, Ch. J. The Court give the direction prayed for. The Court are of opinion, that the goods were shipped upon the credit of the letter; and that the guarantee was to continue until countermanded by the defendant; that the goods were shipped upon the united credit of Hacket and Grant, and the defendant.

The defendant excepted to the opinion of the Court, and the verdict and judgment being for the plaintiffs, the defendant appealed to this Court.

The cause was argued at June Term, 1806, before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Martin*, for the appellant, contended. 1. That the letter wrote by the appellant to the appellees was not an absolute guarantee. 2. That if it was, it did not extend beyond the first shipment after the receipt of the letter. 3. That the *allegata* and *probata* did not agree. He referred, as to the first point, to *Butcher vs. Andrews*, 1 Salk. 23; *Marriott vs. Lister*, 2 Wils. 141; *Jones vs. Cooper*, 1 Cowp. 237; *Matson vs. Wharam*, 2 T. R. 80. On the third point, he insisted that the several counts in the declaration were defective; that the first count was similar to that in *Butcher vs. Andrews*, and *Marriott vs. Lister*, where the judgments were arrested. That in the second count stated a promise, in consideration of having sold goods to H. and G. and the evidence was, that the promise was made before the goods were sold. That in the third count, there was no averment that H. and G. did not pay for the goods; and to the fourth count, that the evidence offered was different from that stated in that count; that it did not pursue the letter of guarantee, which should have been set out according to its date, and in the words \* thereof; and that the facts, as they appeared in evidence, should be stated, as also ought the continuance of the guarantee. He referred to *Esp. Dig.* 140, and 2 *Went. Plead.* 555. That there was no averment in the declaration that Ridsdale and Beaumont, to whom the letter was addressed, and the plaintiffs, were the same persons.

*Curia adr. vult.*

THE COURT at this term concurred with the General Court in the opinion pronounced in the bill of exceptions, but reversed the judgment because of a defective count in the declaration.

*Judgment reversed, and procedendo awarded.*

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DE SOBRY, Ex'r of TERRIER DE LAISTRE vs. TERRIER DE LAISTRE.

Parol evidence admitted to prove the manner in which wills are made and proved in France.

A copy of a will executed in Philadelphia and transmitted to the Island of Martinique by the testator, certified by a notary public of that Island, and returned under a commission issued to take testimony, is sufficiently authenticated by having the certificate of the chief colonial officer as to the signature of the notary public; and which, with the testimony of the testamentary executor, returned under the commission, is sufficiently proved, and may be read in evidence as the will of the deceased.

As to the manner of striking commissioners and issuing commissions to a foreign country to take testimony. (a)

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(a) Cf. *Hattan vs. McClish*, 6 Md. 407; *Owings vs. Norwood*, ante, 83, note (a.)

Proof of the French laws in testamentary affairs, returned under commissions issued to take testimony, and admitted in evidence.

How far the proceedings in a Court in a foreign country is legally authenticated, and how far the exemplification thereof produced contain the whole proceedings, &c.

The mere showing the seal of a Court of our own State in another Court of the State, is a sufficient authentication of the judgment of the Court it purports to certify.

The seal of the Court of a foreign country does not prove itself; but it must be proved by testimony.

Parol evidence admitted to prove the seal of the Court of a foreign country.

Where a question comes incidently or collaterally before the Court, whether or not the same strictness in the admission of evidence, is to be observed as if the question was directly in issue?

The laws of a foreign country are to be proved by evidence, and the Court are to decide what is proper evidence of such laws, and to construe them, and judge of their applicability to the question before the Court.

(a)

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(a) Approved in *Cecil Bank vs. Barry*, 20 Md. 187, where it was held that, although the factum of a foreign law is for the jury to find upon the evidence, yet it is the duty of the Court to construe it, especially if it be in writing, and to direct the jury as to its force and effect. In *Gardner vs. Lewis*, 7 Gill, 377, it was held that reports of adjudged cases are not evidence of the law of the State or country in which they are pronounced. The written law of foreign countries should be proved by the law itself, as written, and the common, customary or unwritten law, by witnesses acquainted with the law. By Rev. Code, Art. 70, sec. 46, the public or private statutes of the U. S. or of any State or Territory of the U. S. may be read in evidence from any printed volume purporting to contain the statutes of the said U. S. State or Territory, and the said printed volume shall in all cases be received as evidence of said statutes without any further authentication or proof thereof. A foreign law is a fact to be proved as other facts: if unwritten by the testimony of experts: if statutory by the law itself or an exemplified copy. *R. R. Co. vs. Glenn*, 28 Md. 323; *Zimmerman vs. Helser*, 32 Md. 278. A lawyer 34 years of age and residing in New York is competent to testify whether a receiver in making a sale under the statute law of New York complied with its requirement as notice. *Consolidated, &c. vs. Cashon*, 41 Md. 60. The testimony of two witnesses, (lawyers,) that they are of opinion a certain deed is, according to the laws of Kentucky, where it was executed, legal and sufficient to convey the property to the grantee, and that they know of no statute of that State affecting this opinion, is sufficient proof of the foreign law, and this being the only testimony on this point, and the question being whether the deed should be admitted in evidence, the proof is for the Court. *Wilson vs. Carson*, 12 Md. 54. The rule that foreign laws are facts to be found by the jury is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the Court to determine whether a written instrument is evidence. In such case the evidence always goes in the first instance to the Court, which, if the evidence be clear and uncontradicted may, and ought, to decide, what the foreign law is, and act accordingly. *Trasher vs. Everhart*, 3 G. & J. 284. If what the foreign law is be a matter of doubt, the Court may decline deciding it and may inform the jury that if they believe the foreign law attempted to be proved exists as alleged, then they ought to receive the instrument in evidence: if not they should reject it. *Ibid.* The recognition

The letters of a witness permitted to be read in evidence to impeach his credit as to what he had sworn upon his examination taken under a commission, contradictory to the contents of the letters, but not to prove any other fact. (a)

If a contract is in writing it will itself show where it is to be executed; but if it does not appear on the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country.

If a contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed.

A contract made in a foreign country must be governed by the laws of that country, and no acknowledgment of the debt in another country can change the original nature of the debt.

If the plaintiff in an action of *assumpsit* files an account in Court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that he had elected by his account to consider the defendant his debtor.

(b)

Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled.

Personal property adheres to the person; and wherever the testator is domiciled at the time of his death, the property is to be distributed according to the laws of that country. (c)

Whatever fund in this State is answerable for debts, is answerable to all creditors alike according to the laws of the State.

If the laws of this State give a preference to its citizens in the payment of the debts of a deceased, the defendant, if sued by a foreign creditor, must plead such preference.

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of the laws of another State in the administration of justice in this is not a right *stricti juris*, but depends entirely on comity and in extending it. Courts are always careful to see that the statutes or policy of their own States are not infringed, to the injury of their own citizens. *Wilson vs. Carson*, *supra*.

(a) When it is proposed to contradict a witness by evidence of previous conversations at variance with his testimony, a proper foundation must be laid by interrogating the witness as to his specific statements in those conversations. *Waters vs. Waters*, 35 Md. 582; 2 *Poe's Pldg.* sec. 280.

(b) But see *Carter vs. Tuck*, 3 Gill, 250.

(c) Affirmed in *Noonan vs. Kemp*, 34 Md. 78. The right and succession to personalty must depend on the law of the domicile: but the law of the place where the property is found must be appealed to, to determine whether it is moveable or immoveable. *Newcomer vs. Orem*, 2 Md. 297. Cf. *Currie's Case*, 2 Bland, 498, 499. *Mobilia sequuntur personam*: the personal estate accompanies the owner wherever he may become domiciled, so that he has the right to dispose of it according to the law of his domicile. *Tax Court vs. Patterson*, 50 Md. 371. This case was affirmed in *Bonaparte vs. Tax Court*, 104 U. S. 592.



An executor *pro forma* is accountable to the testamentary executor only for the surplus remaining after payment of debts.

If an heir pure and simple, heir with benefit of inventory, or beneficiary heir, has not intermeddled with the estate or succession of a person dying in France, so as to prevent his recovery as such under the laws of France, he can recover in the Courts of this State on a contract made in France.

Whether or not his having intermeddled would defeat his right of recovery?

It is a general principle, which admits of few exceptions, that in construing contracts made in a foreign country, the Courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired and the obligations created by it; and the remedy or mode of enforcing it is to be conformable to the laws of the country where the action is instituted. (a) ✓

Where by the terms of a contract it is to be executed in another country, there the parties to it by common consent adopt the laws of that country as the rule of decision.

Where a contract is *contra bonos mores*, as for the price of prostitution, such a contract, though legal in some countries would not be enforced in this State.

Unless the jury are satisfied according to the laws of France, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, then such co-heir is entitled to recover as a creditor whatever the jury may find due on a contract made in France, according to the laws of France.

If a contract is made in this State between foreigners, and the debtor dies in a foreign country, the creditor may recover in the Courts of this State, according to the laws of this State.

No part of the personal estate of a testator dying in France, is subject to distribution among his co-heirs, but the surplus or residuum remaining after the payment of all his debts and legacies; and a debt due to one of the co-heirs is as much entitled to payment as a debt due to a stranger, unless there is proof that there is a law of France which extinguishes

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(a) Affirmed in *R. R. Co. vs. Glenn*, 28 Md. 321. The rule of comity adopts the law of the country where the contract is made in placing a construction upon it. Efficacy is given to its obligations according to the foreign law, unless *contra bonos mores* or against some positive law of the State where the contract is sought to be enforced. This is necessarily the rule, for otherwise no reasonable interpretation could be given to such a contract. *Ibid.* No right can be derived under any contract made in express opposition to the law of the place where such contract is made. *Hall vs. Mullin*, 5 H. & J. 193. Cf. *Harper vs. Hampton*, 1 H. & J. 374. While the *lex loci contractus*, controls the nature, construction and validity of the contract, (except where it would be against public policy or of immoral tendency to enforce that construction here,) that law is never looked to, to determine the remedy which should be used to enforce the contract. This is determined by the *lex fori*. *Trasher vs. Everhart*, 8 G. & J. 234; *Dakin vs. Pomeroy*, 9 Gill, 6; *Pritchard vs. Norton*, 106 U. S. 133. But where the contract is made in reference to the *lex loci*, that is where that law regulates the contract, defining the rights of the parties thereunder, and prescribing the remedies, it necessarily enters into its essence, forming a constituent element thereof and the contract and the rights of the parties thereunder must be enforced accordingly. *Eastwood vs. Kennedy*, 44 Md. 572.

the right or claim of the co-heir creditor with benefit of inventory, if he does not renounce as co-heir.

The laws of France are matters of fact to be found by the jury upon evidence to be produced to them, and unless they find some law of France which extinguishes the claim or right of recovery of the plaintiff (being co-heir and creditor) he has a right to recover; and the Court directed the jury that it did not appear to the Court that there was any law of France, which was a legal impediment to the plaintiff's recovery. (a)

A contract made in one country with a view to the execution or performance of it in another country, is governed in all things both as to its essence and the mode of enforcing it, by the laws of the latter country.

**ERROR** to the General Court. The defendant in error, Lewis Augustine Terrier de Laistre, brought an action of assumpsit against Benjamin de Sobry, executor of Michael Terrier de Laistre, (now plaintiff in error). The declaration contained four counts: The first for £4,518 17 7 current money, for sundry matters, properly chargeable in an account. The second for money had and received. The third for money laid out, expended and paid; and the fourth for money lent and delivered. The defendant pleaded non-assumpsit and *plene administravit*; to which the general issues were joined.

**193** \* 1. In the course of the trial at October Term, 1804, the defendant in the Court below, offered to read in evidence the testimony returned, with a commission, which he obtained at May Term, 1800, and which issued on the 22d of July following, to the Island of Martinique. This testimony was copies of the will, and several codicils, made by the defendant's testator, and certain interrogatories and answers thereto by the testamentary executor, which being extracted and translated, are as follows, viz: "Mr. Lewis Augustin Terrier de Laistre, having produced, as a witness, Mr. Dominick Pechier, merchant, dwelling in the parish of the Fort of the City of St. Pierre, testamentary executor of the said Mr. Michael Augustin Terrier de Laistre, as appointed by his will, deposited in the hands of Messrs. De Le Blanc and Ciceron, royal notaries public of this island, the 14th of April, 1797, we have administered oath to the said testamentary executor, and have interrogated him in the following manner: *Inter.*—Do you know whether the said Mr. Michael Augustin Terrier de Laistre has put into writing his testament and last will? *Ans.*—Yes. He made an olograph will, of a copy of which I was the depositary in my quality of testamentary executor. To which said olograph will is annexed a codicil, likewise olograph. *Inter.*—Can you say where and when the said will was made? *Ans.*—The said will bears date, Philadelphia, 1st April, 1795, and the codicil thereto annexed, bears date Philadelphia, the 29th of June, 1796." "And an attested copy of the said will, and codicil thereto annexed of the said Michael Augustin Terrier de Laistre, and which we have hereunto annexed, having been produced and

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(a) See note (a) *ante*, p. 165.

read to the deponent, we interrogated him as follows: *Inter.*—Does the paper, which has just been showed to you, express the last will and testament of the said Michael Augustin Terrier de Laistre, to the best of your knowledge and belief? Declare all that you know, have heard, or believe. *Ans.*—I know the said paper to be the last will and testament of the said Michael Augustin Terrier de Laistre.

*Inter.*—Do you know whether the said Michael Augustin Terrier de Laistre, made in his life-time any other codicils in writing? *Ans.*—I declare that he made three others, of which I was likewise the depository in my quality of testamentary executor; the first bearing date St. Pierre, Martinique, the 14th of April, 1797, received by Messrs. D. Le Blanc and \* Ciceron, royal notaries of this island; and a supplement of the same day and year, signed by Messrs. 194 Bonifaye and Ciceron; the second, St. Pierre, Martinique, the 25th of April of the same year, received by Messrs. Ciceron and Wanter, royal notaries of this island; and the third, St. Pierre, Martinique, the 10th July, 1797, nine days before his death, received by Messrs. Ciceron and Therry, royal notaries of this island.

“And a legally attested copy of these three codicils hereto annexed, being produced and read to the said deponent, we interrogated him as follows: *Inter.*—Are the papers now shown to you the last codicils, and do they express the last intentions of the said Michael Augustin Terrier de Laistre? *Ans.*—I declare that the said papers are truly the last codicils and last intentions of the said deceased.” Annexed to copies of the said will and codicils, as returned with the commission, are the following certificates, to wit:

“Collated, CICERON.

“We, John Augustin Regnaudier, commissioner of the King, and procureur, (attorney,) holding for this purpose the place in the absence of Mr. John Aman Astory, commissioner of the King, titular senichal of St. Pierre, Martinique, certify to all whom it may concern, that the above signature is that of Mr. Ciceron, notary, dwelling in this island, and that faith ought to be given to it as well in Courts of justice as thereout, and to all that he signs in that quality. In testimony whereof we have signed these presents, and thereto fixed the seal of this colony, where stamped paper is not in use. Given in our hotel at St. Pierre, Martinique, the 20th July, 1801.

REGNAUDIER.

[L. s.] Sealed at St. Pierre, Martinique, the 20th July, 1801.

JACQUIER.”

The plaintiff objected to these copies being read in evidence, because they were not legally proved and certified.

*Martin*, (Attorney-General,) and *Purviance*, for the defendant, stated, that by the laws of France there were two modes of making wills—one was a will entirely in the hand-writing of the testator, which was called an olograph will; the other one written by a notary

public, agreeably to the directions of the testator; and that when written and read to the testator, and by him signed, and also signed by the notary, it was a good will, and was called \* a solemn will. The will offered in evidence was an olograph will, executed in Philadelphia by the testator, and by him transmitted to certain notaries public in Martinique, where it remained. The commission, which issued in this case, was to ascertain if there was a will, and to have a copy exhibited and proved by the executor named in the will. It was legally authenticated, according to the Act of 1785, ch. 46. The original will could not be produced, having been lodged in the office of a notary by the testator himself, but the copy was authenticated by the notary in the manner directed by the laws of France.

*Harper and Boyd*, for the plaintiff, contended, that it was a fixed principle in the law of evidence, that a will must be proved in one of three ways—1. The original must be produced, and the execution proved. 2. An authenticated copy from an office of record, properly certified. 3. If an authenticated copy is not produced, then proof that it is a true copy from the original, if the original is in the possession of a person or officer not authorized to record it. They cited *Peake's Evid.* 48, (notes,) 73, (notes.) *Anon.* 9 *Mod.* 66; *Henry vs. Adey*, 3 *East*, 221; *Moises vs. Thornton*, 8 *T. R.* 303; and *Stevenson vs. Myers*, 1 *H. & J.* 102.

CHASE, Ch. J. The Court are of opinion, that the certificate of the colonial officer of the signature of the notary public, is sufficient to authenticate the copy of the will, and that the same is sufficiently proved, and may be read in evidence to the jury.

2. The defendant also offered to read in evidence the commissions which issued in June, 1803, to Paris, Martinique and Bordeaux, and the returns of those commissions made at May Term, 1804; but which were objected to by the plaintiff, because the commissions had not been regularly issued. The facts were, that on the docket of the Court at May Term, 1803, the entry is "commissions are ordered by consent, on the part of the defendant, to Paris, Martinique and Bourdeaux, on striking commissioners; if the commissions are not returned at the next term, it will then be no cause of continuance."

196 "The defendant's commissioners \* struck the 18th June, 1803, (Saturday.) See their names mentioned in a paper filed." On that paper in the hand-writing of the attorney-general, (one of the attorneys for the defendant,) after naming four persons as commissioners to each place, is as follows; "An order for commissions to our commissioners, unless plaintiff strikes commissioners on Monday," (the 20th June.) There was no order made in the docket or in the minutes of the Court. The Court met on Monday, the 20th of June, for the purpose of making some few entries. The jury had been discharged on Saturday, the 18th of June. The plaintiff, and his

counsel, and the counsel of the defendant, left the Court for Baltimore on Saturday. The defendant remained, and on Monday the 20th June, he obtained his commissions from the clerk. Neither the plaintiff, nor his counsel, had any notice of the names of the commissioners struck by the defendant, nor of the order intended to be obtained for the striking commissioners on the part of the plaintiff. Defendant, after obtaining the commissions, went to Baltimore, where interrogatories, were prepared to be forwarded with the commissions. The interrogatories and commissions were taken to the plaintiff's counsel, and a proposition made to him to strike commissioners, if he did not approve of those persons to whom the commissions had issued, so that new commissions might be obtained. The plaintiff's counsel alleged that his client had left Baltimore for Elizabeth-Town in the State of New Jersey; that he did not himself know of proper characters, nor would he consent to any thing, but would take all legal advantages. It was then proposed, (as stated on the part of the defendant,) that the counsel should write to the plaintiff, and the defendant would wait, and retain the commissions until he should hear from the plaintiff; but this was declined by the plaintiff's counsel, and the commissions were forwarded. But on the part of the plaintiff, it was stated, that the defendant proposed to wait one post, which the plaintiff's counsel observed would not answer, as he could not hear from the plaintiff in that time.

CHASE, Ch. J. The Court consider the order as not done in the usual form for striking commissioners; but it appears to have been done in the hurry of business at the \* rising of the Court. Time ought always to be given for striking commissioners; **197** and an order of Court for that purpose should have been made. In this case the order is general, that the commissions were to issue on commissioners being struck. It should therefore be executed in a reasonable time. The commissions issued precipitately, without sufficient time to the plaintiff to strike commissioners; and if the case depended solely upon the docket entries, it would be considered as irregular. But upon the disclosure of facts stated in the affidavits, it appears that the plaintiff's counsel had an opportunity given him of striking commissioners. If the Court had made an order, they would not have allowed more than five days for striking commissioners. The defendant, it appears, offered time—"one post." Here, too, is a material fact in which the affidavits do not agree. The defendant's attorney's affidavit states, that no specific time was proposed, but generally that the defendant would wait an answer from the plaintiff; but the plaintiff's attorney's affidavit states that the time was limited to "one post." The Court, however, suppose this time was sufficient to obtain the names of commissioners, situated as the parties were. The irregularity of issuing the commissions was cured by these circumstances. Every thing which tends to bring the

justice of the case before the Court ought to be done. These commissions were returned to the last term, when this objection might have been made; and if the commissioners had been considered by the Court as having issued irregularly, they might have been suppressed, and the defendant would have had time to issue new commissions, upon the same terms as the former, "that if they were not returned at this term it would be no cause for a continuance." But if they had been considered as illegally issued, and if the plaintiff thought that the commissions had been improperly executed, he had then an opportunity of counteracting them, by obtaining at that time new commissions upon the same terms the defendant had obtained his; for it is an established rule of this Court, that upon the return of a commission, the opposite party has a right to a continuance of the cause until the next term. For these reasons the Court are of opinion, that the commissions, and the testimony taken thereunder, ought to be read to the jury.

**198** \* 3. The first bill of exceptions.—The plaintiff gave in evidence, that he is the eldest son of Michael, the defendant's testator. He also read to the jury two original letters from his father to him, dated at Bourdeaux, in France, and addressed to him at Paris, in France, one dated the 21st of May, 1793, wherein the testator acknowledged that he had received a sum of money for the plaintiff, and as he could not invest it, he proposed to take the sum of 12,000 livres himself, at 5 p. c. interest; and the other letter, dated the 1st of August, 1793, acknowledged that he had offered for the plaintiff 28,000 livres from Mrs. Aubin. He also received in evidence, that sometime in the year 1794, the testator and the plaintiff, came to Philadelphia, where or near to which the testator resided till the 6th of April, 1796; and that the plaintiff, from the time of his arrival at Philadelphia, until the present time, hath always resided within the U. S. He also read in evidence a memorandum in the hand-writing of the testator, made in a memorandum book kept by him, which memorandum bears date on the 30th of September, 1795, and is as follows, viz. "The four servants given to my eldest son by his marriage contract, to wit:

Bruno, a mulatto, hair-dresser, estimated at.....	4,500
Antoine, my domestic hair-dresser,.....	3,000

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Liv. 7,500

Both of whom are dead.

Noal, a cook—sold.....	2,850
Maydelon, a washer-woman.....	2,000
	<hr/> 4,850

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12,360

N. B. He returned to me the above mentioned four servants on his departure from Martinique; for which said servants, as well as

for the sum of 40,000 livres, which he caused to be delivered to me at Bordeaux, before his departure for North America, my estate is responsible to him." He also read in evidence a letter from the testator to him, bearing date at Philadelphia, on the 22d of May, 1795, and addressed to him at Trenton, viz. "I have not yet been able to employ myself in making use of the bill of exchange of 170 dollars, (3,440 livres,) on Havre, but \* I will attend to it as soon as my health permits me to go out." Also another letter from **199** the testator to him, bearing date at Philadelphia, on the 15th of October, 1795, and addressed to him at Trenton, of which the following is an extract:—"I remitted to St. Claire Claudel your bill of exchange, drawn by Moisy, for 170 dollars, (3,440 livres,) that he might receive payment and pass it to the credit of my account." He also gave in evidence, that all the aforementioned letters, and the memorandum, are in the hand-writing of the testator, and that the letters were by him transmitted to the plaintiff, and duly received, according to their respective dates and addresses; and they were offered and given in evidence, to prove the debt due to the plaintiff, for which this action is brought, as stated in the account by him filed. He also gave evidence that the several sums of livres mentioned in the said letters and memorandum book, were of the value of, and amounted in the whole to the sum of \$9,628 63 current money of the United States; and that the usual and legal interest of money in France, and her colonies, was at the times aforesaid five per centum. He also gave in evidence, that the testator departed this life on or about the 20th of July, 1797, and that the defendant, as his executor, did, in the month of October in the same year, receive into his hands money belonging to the estate of the deceased to the amount of \$13,092 68 current money of the U. S. out of which he claimed an allowance for disbursements and commissions, to the amount of \$1,200 07 like money, leaving in his hands, subject to the legal claims against the estate of the deceased, the sum of \$11,892 61 current money. The defendant then gave in evidence, that the testator, in his life-time, duly executed certain wills and codicils, which were made and executed respectively, at the respective times and places therein respectively stated, viz. "I, Michael Augustine Terrier de Laistre, aged 61 years, generally resident in St. Pierre, in the Island of Martinique, but now at Philadelphia, in Pennsylvania, one of the thirteen United States of America, being desirous of making known to my children my final intention, have made and written, with my own hand, this my last will and testament, to which I particularly enjoin my eldest son to manifest his respect by an exact performance of its contents; hereby revoking all former wills and codicils by me at any time \* heretofore made, and declaring this to be alone good and valid." The bequests material to the question in **200** controversy, are the following: 7th. "I give and bequeath unto my natural son Chery, now about twelve years of age, and raised from

his childhood at St. Pierre, in Martinique, by Madame Duquesnay, the sum of fifty thousand livres, colonial money, payable on the partition of my estate, unless it should please better my heirs to admit him as co-heir, conformably to the tenor of the Acts passed by the National Assembly in favor of illegitimate children; then and in such case, I will and direct that he have his proportionable share, according to the right vested in him by law, if my heirs do not choose rather that the said sum of 50,000 livres should be paid him out of the surplus of my estate, after payment of debts, &c. Enjoining him moreover to continue to bear the name of Chery Terrier." 10th. "I hereby constitute and appoint Anthony Viau, my agent at present in Martinique, executor of this my last will and testament," &c. "And in case of the death or absence of the said Anthony Viau, I constitute and appoint, in his place, my friend Mr. Crassous, merchant of Martinique, begging him to accept this charge, with the same indemnification as aforesaid, and thereby give me this last mark of friendship." 11th. "As to all the rest and residue of my estate, whether real or personal, debts due me, &c. which I may leave in America, I constitute and appoint Messrs. De Saa, father and son, executors thereof, to administrate on that property only of which I may die possessed in America, conformably to my intentions expressed in this my last will and testament, of which I have left them an authentic copy." 12th. "I hereby name and constitute my eldest son, Lewis Augustin Blaise Terrier de Laistre, as an heir in my succession; and I also will and direct, that after my decease, a true and faithful inventory may be made of all my property, out of the amount of which property, all the bequests generally expressed in the present testament shall be faithfully discharged; and in case Anthony Mark Terrier de Laistre, younger brother of my said eldest son, should not please to divide with him the estate of their mother, conformably to the schedule I have annexed to this my last will and testament, in which schedule his moiety is clearly designated, but should choose rather to recur to the general inventory which will be made \* after

**201** my decease, then and in such case I will, and most expressly direct, that the sum of 40,000 livres, reserved from the portion brought by me in my marriage contract, and also the sum of 2,000 livres, which I am entitled to claim and receive from my wife's estate, by virtue of the said marriage contract, the said sums amounting in all to the sum of 42,000 livres, be deducted and reserved for my grandchild, Augustin Paul Emile, son of my eldest son, who shall possess and enjoy the same on the surety of his judicial oath, until his said son Augustin Paul Emile attain the age of 21 years, or be married; and in case this reserve should give rise to any legal difficulty, I then give and bequeath, purely and simply to my said grandchild, the sum of 42,000 livres, to be employed and disposed of as above directed, and payable out of the surplus of my estate, after all my debts, and the bequests herein contained, shall be discharged.



Authorizing, moreover, by these presents, my eldest son to renounce my succession, and retain the portion brought by him in this marriage contract, without returning any thing to the general stock; he also claiming from my estate all that I lawfully owe him, whether for the different sums which, on my last voyage, he caused to be paid me in France by Madame Aubin, or, for the four domestics I gave him by the said contract, and which, before his departure for Martinique, he delivered for my account and risk to Mr. Viau my attorney." 13th. "I constitute and appoint, as heir of my succession, my youngest son, Anthony Mark Terrier de Laistre, whether he prefers to rely on the partition of the property possessed in common by his mother and myself, according to the statement I have subjoined to this my last will and testament, in which his portion of the maternal estate is distinctly marked out, or chooses rather to recur to the general inventory to be made after my decease, out of which his portion will be ascertained by law. I also will and direct, that the share accruing to him from my estate, shall consist of immoveable property, and my will and meaning is, that the said immoveable property be not aliened by him under any pretext whatever, in order that it may descend to his issue, and in default of such issue, be equally divided among the children of his elder brother; this disposition not being regarded as an entail, but as a prudential and safe mode of securing some part of my estate \* to my grandchildren." 14th. "As the laws recently promulgated **202** by the republic on the subject of inheritances, restrain the testator from the free disposal by will of more than one-sixth part of his possessions, and allot the residue, the remaining five-fifths, to his natural heirs; and as it is impossible for me to ascertain at this juncture the amount of my property, I will and direct, that in case my two legitimate sons, or any one of them, should choose to adhere to the precise letter of the law, in opposition to the disposition contained in this my last will and testament, then and in such case, that my natural son Chery, already a particular legatee by these presents, and my four natural daughters called Adelaide, Mariette, Rosette, and Marguerite, also legatees as aforesaid, be all five called in as co-heirs in my succession, each respectively renouncing to his or her respective legacy, and drawing from my estate such proportionable share as the law allows. And, as for the one-sixth of my property, of which I may freely dispose, I will and direct that as soon as it is determined by the inventory, the amount of the bequest made to the mestive Sophia, be deducted therefrom, and paid her in full, with all possible dispatch, which bequest I hereby confirm and ratify. And I also will and direct, that the surplus of the one-sixth, after such deduction made, be divided among the other legatees named in this my last will and testament, such share accruing to each as is proportionable to the amount of his or her respective legacy." "Such are my last desires clearly expressed in the present testament, writ-

ten with my own hand, and which I fully confirm and ratify, after having attentively perused and reperused the same. Done and signed by triplicate, and one copy to be deposited with Messrs. De Saa, father and son, appointed by these presents my executors for the administration of that alone of which I may die possessed in America; a second transmitted to Martinique, to be there lodged with a notary; and the third enclosed in my port folio, all three copies being sealed with three seals, bearing the stamp of my cypher, as may be seen in the margin, at Philadelphia, in Pennsylvania, one of the thirteen United States of America, this first day of April, in the year of our Lord, 1795." A codicil, revoking the legacy to Sophia, confirming and ratifying all other parts of his will. Signed 29th of June, 1796.

"TERRIER DE LAISTRE."

**203** \* "Last will and testament of Michael Augustin Terrier de Laistre, done in the presence of Messrs. Ciceron & Le Blanc, notaries of St. Pierre, in the Island of Martinique. On this 14th day of April, 1797, about 11 o'clock in the morning, we the undersigned notaries attended Michael Augustin Terrier de Laistre, chevalier, &c. resident in the City of St. Pierre, &c. aged 64 years, lawful son of, &c. who being confined to his bed, infirm of body, but of sound and disposing mind, as it hath appeared to us by his several questions and observations, and wishing to arrange his temporal affairs before the moment of his death, which is uncertain, requested us to receive the subsequent codicil and expression of his testamentary desires, which he dictated word for word in the following manner:" The bequests material to be mentioned are the following: 8th. "The said testator gives and bequeaths unto his natural son Cheri, about 15 years of age, and raised from his infancy in this island by Madame Duquesnay, the sum of 50,000 livres colonial money, to be appropriated to his subsistence and education; begging his executor hereinafter named to transmit the funds requisite for the payment of the said sum to Mr. Benjamin De Sobry, merchant of Baltimore, who has had the goodness to act the part of a father towards him during the absence of the testator; entreating him therefore to continue the same parental care, and with the sum which he bequeaths to the said Cheri, to place him in a situation that may ensure to him a life of tranquillity and ease; enjoining moreover his said natural son to continue through life to bear the name of Cheri Terrier. The said testator also gives and bequeaths to the said Cheri his wardrobe, rings, jewels and private fire arms, which shall be found belonging to him after his decease; reserving only from the number of his jewels his diamond cypher and repeating watch, of which he has disposed by his will of the 1st of April, 1795. Hereby ratifying and confirming the said disposition." 11th. "The said testator gives and bequeaths unto his friend Benjamin De Sobry, merchant of Baltimore, all his movables and effects, of what nature soever, of which he may die possessed in America; and also what-

ever he may discover to be due to him; charging him, however, by these presents, with the payment of his debts in the said continent, [*dans le dit continent*,] if any there be: Hereby also \* fully empowering him, as well to recover whatever may be due to him, **204** as to discharge his debts aforesaid, without being held accountable for the said effects to any person whatever." 14th. "The said testator names and institutes, as his heirs in his said succession, his eldest son, Louis Blaise, as well as his younger, called Anthony Marc Terrier de Laistre; hereby constituting and appointing them his universal legatees for equal shares in his said succession; strenuously recommending to them to preserve harmony between themselves, and respect for the present codicil, which the said testator wills and directs should be fully executed in all and every part. And his will and meaning also is, that the part and portion of that one of his said sons, who shall first die without issue, shall remain to the survivor." 15th. "The said testator hereby constitutes and appoints, as his executor, Dominick Peschier, merchant of the City of St. Pierre, of whom he earnestly requests this good office. And in consideration that the function of executor is necessarily attended by some trouble and derangement, he begs him to accept the bequest which he now makes him, of the sum of 13,200 livres colonial money, which said sum he may take before the delivery over of his succession to the heirs; the said testator dispossessing himself of all his estate, in order to invest him with the same, from the day of his decease, conformably to custom." 16th. "The said testator revokes all other wills and codicils by him heretofore made, declaring this alone to be good and valid, as well as his will and testament, written with his own hand, of the 1st of April, 1795, fully ratifying and confirming the same, and all the gifts, bequests, matters and things, therein contained, except only the changes made and designated in the present codicil; and the said testator also wills and directs, that the said testament shall be joined to the present codicil, to be returned into his hands whenever he shall please to demand the same, which has been regularly marked *ne varieter*, by the above mentioned notaries." "Done," &c.

Signed,

TERRIER DE LAISTRE.

CICERON &amp; LE BLANC, Notaries.

Collated,

CICERON.

Other codicils of the 14th April, 1797, 25th of April, 1797, and 10th July, 1797, making some trifling alterations, and confirming other wills and codicils not altered, &c. \* The defendant also gave in evidence, that the executor testamentary therein **205** named, that is to say, Dominique Peschier, residing in the Island of Martinique, did take upon himself, after the death of the testator, the burthen of the execution of the wills and codicils, according to the laws of the French government, in force and effect in that island; and that he did on the 24th of July, 1797, write to the

defendant a letter, and send the same with a copy of a certain part of the will or codicil, dated the 14th of April, 1797, to enable the defendant to carry into execution that part of the will in which the defendant was interested. The defendant also gave in evidence, that Peschier did, on the 4th of January and the 15th of December, 1798, write letters to the defendant, and send the same, of which the following are true translations: That of the 4th of January, 1798, is as follows: "I am glad to see by yours that you had duly received my letter of the 24th of July, which informed you of the death of Mr. Terrier de Laistre, (of whom I was the executor,) and forwarded you a copy of the articles of his last will and codicils, which concern you, and his son Chery, whom he recommends to your good cares. An inventory has been made, in legal forms, of all the credits and debits: But the latter cannot be perfectly known, because the deceased had many friends in France, with whom there are accounts to settle, and which cannot be done by reason of the war. It results, that the net amount of the estate cannot be ascertained, of course the inventory is imperfect, and cannot be rectified till after the war. Messrs. Terrier de Laistre have taken the quality of conditional heirs, and have lately applied for a delay of six months, which has been granted to them. After its expiration they will probably ask for more time, which will also be granted; and this will go on until the return of peace. Until they take a determination on the subject, I cannot dispose of any thing. All the furniture and effects which are coming to young Chery, have been inventoried and shut up in a cupboard. Whatever may happen, the estate is good, but the heirs wish to be perfectly acquainted with it. They have told me that they are well disposed to fulfil the will of their father, if they are not too much injured. The law grants them the option to have the community of their mother continued to the death of their father, because he had not made a legal \* inventory; **206** they wish to know which is more advantageous to them, either to have the community continued, and to receive their legitim, or to take the quality of heirs. This is the actual state of the business. I am going on with the liquidations in collecting the debts, and paying what is legitimate." The letter of the 15th December, 1798, states that the inventory, on account of the war, had not been completed; and it also stated, that "the heirs moreover, (one of whom, Mr. Terrier de Laistre the younger, is now here, and represents his brother, who is on your continent, and who has sent him his power,) being desirous to administer their properties themselves. These considerations, and the impossibility to know how long it will require for the liquidation; I say, that actuated by all these reasons, I have rendered my accounts to the heirs, who from that time, administer their properties themselves. I have already informed you, that these gentlemen oppose the execution of the will, so far as regards the legacies, and that the suit is going on. Mr. Duques-

may has by a decree of the Court, been nominated guardian to the young Chery, and defends his interest in that quality. It is necessary to go on with the suit, and wait for its conclusion, in order to abide by the judgment." He also gave in evidence the proceedings in the Orphans' Court of Baltimore County, upon the exhibition and proof of that part of the codicils and wills of the testator, being the 8th and 11th clauses in the will or codicil of the 14th of April, 1797, as herein before mentioned, with a direction thereto annexed by the testator, requiring certain persons, in whose hands some of his effects were, to deliver the same up on notice of his death, to the defendant, and proof thereto, and to the extract of his will annexed, of the hand-writing of the testator. Upon which letters testamentary were granted to the defendant on the 15th of November, 1797, and which letters testamentary the defendant also gave in evidence to the jury. He further gave in evidence, that the testator was a native of the kingdom of France, and for many years before his death was a citizen of the Island of Martinique, and resident of that Island, which was, during the whole time that he there resided, until his death, and at the time of his death, subject to, and governed by, the same laws as the other lands of the West Indies, dependent on the government of \* France. That the testator came to the U. S.

on the 6th of November, 1793, and left the U. S. to return to **207** the Island of Martinique, on the 6th of September, 1796, and that having arrived at that Island, he departed this life, at that place, on the 19th of July, 1797. That the sum of 12,360 livres, money of the Islands, which constitutes the first charge in the plaintiff's account, is the estimated value of four slaves, which were delivered by the testator to his son, the plaintiff, as a part of his marriage portion, and which were, by the plaintiff, again returned to the testator, some time about the year 1792. That the plaintiff was not entitled, by the French laws regulating this question, to claim either that sum, or interest thereon, or any part thereof, as the creditor of his father, or of his father's estate, unless he absolutely and entirely repudiated and delivered up the succession, and his right as heir, after his father's death, and renounced all right in, and claim to, the succession of his father; and that the plaintiff had not so done. That the sum of 12,000 livres, in the account mentioned, was lent by the plaintiff to the testator, and at his instance received by the testator in assignats, at their normal value, and not in specie, and that assignats at that time were only in comparison of specie, valuable in proportion as 44 to 100; and that the sum of 28,000 livres, in the account mentioned, was lent by the plaintiff, in France, to the testator, and by him received in France in assignats, and not in specie, at the normal value of assignats, and that assignats, at the time of this loan, were only of value compared with the specie as 33 to 100, and that the sum of 12,000 livres were advanced to the testator on account of the plaintiff, the 21st of May, 1793, or thereabout, by Madame Aubin

Blampre; and the sum of 28,000 livres by the same lady to the testator, on or about the 1st of August, 1793; and that the plaintiff did afterwards repay the same advances to her in assignats, at their nominal value, and not in specie. That according to the French laws operating upon and regulating the said loans, the plaintiff is not entitled to receive interest of any kind thereon, or on either, except from the time of bringing this suit: And as to the claim in the account of 3,440 livres, the defendant gave in evidence, that one Moisy, being indebted to the plaintiff in the sum of \$170, drew a bill in favor of the plaintiff upon his, the drawer's correspondent, in Havre-de-Grace, \* to be there paid in assignats, at the exchange of 20 livres for each dollar, and that the same being indorsed by the plaintiff, was delivered to the testator to be remitted to his correspondent in France, to receive from the person upon whom the bill was drawn the amount thereof in assignats, and that for want of proof being furnished by the plaintiff, that he had left France with proper passports, and had resided constantly in the United States, and that the plaintiff was not subject to the laws of the French Government against emigrants, the correspondent of the testator never received any payment of the bill, and that the testator received no part thereof, but that the bill yet remains unpaid in the hands of the person to whom it was remitted. He further gave in evidence the settlement made by him in the Orphans' Court of Baltimore County, whereby it appears that he charges himself with the receipt of \$13,092 68 current money, received of the effects of the testator, and credits himself with \$1,200 07 like money, for disbursements, debts, &c. by him paid, and for which he is allowed, leaving the sum of \$11,892 61 like money, in the hands of the defendant, and which he retains, being left him by the deceased's will. That the sums with which he charged himself in the account, proceeded from the sales of divers goods, wares and merchandise, which were in the U. S. when the testator died, and from certain debts which remained due in the U. S. to the testator, and from remittances of property which he made after his arrival at Martinique. That several claims of considerable value which the testator had against persons in the U. S. when he departed therefrom to return to Martinique, and which the defendant was authorized by him to receive, were afterwards paid to or settled with the testator himself, after he went to Martinique, and therefore did not come into the hands of the defendant, but went to increase his estate in the Island of Martinique; and to establish the same, the defendant offered in evidence, a letter written by the testator to the defendant, bearing date at Martinique, on the 20th of March, 1797. The defendant also offered in evidence, the different remittances and funds remitted to the testator while in the U. S. including the merchandise received by Anthony Butler; the remittances made by him to his creditors while in the U. S. his expenditures while

there, and the sum he carried \* from hence when he left the U. S. and to show and prove the same, offered in evidence certain extracts from the memorandum book produced by the plaintiff, in the hand-writing of the testator, viz: **209**

"My general account in the continent :

Dr.

1795, June 25.	Balance of 4 Bills of Exchange for my adventure .....	\$3,198, $\frac{1}{2}$ .
1796, June 18.	To Duvall Monville, received for his account by a bill of Mrs. Anguart, his sister .....	792
July 23.	To Viau, net amount remitted by him as appears, &c.....	4,586, $\frac{1}{2}$ .
		<hr/>
		\$8,576, $\frac{1}{2}$ .

Cr.

1795, Dec. 31.	By 13 months expenses, as appears by the particulars .....	\$1,225
1796, Sep. 30.	By 9 months do. do.....	936
		<hr/>
	For 22 months expenses .....	\$2,161
	By remittance to St. Claire.....	800
	By do. to Ollie.....	2,400
	By do. to Eyma.....	800
	By do. to Dancemont.....	124, $\frac{1}{2}$ .
		<hr/>
		4,124, $\frac{1}{2}$ .
	For advances to divers,	
	To Deville, Junr.....	370
	To Mrs. Luppi.....	533
		<hr/>
		903
	Furnished to divers,	
	To Chery.....	593
	To De Laistre.....	722
		<hr/>
		1,315
	For my passage, 50, for my expenses 3, $\frac{1}{2}$ .....	53, $\frac{1}{2}$ .
	Carried with me in specie.....	20
		<hr/>
		73 38

\$8,576,  $\frac{1}{2}$ .

\* Concluded at Baltimore, this 5th of September, 1796, until the end of September."

**210**

The defendant also offered evidence to prove, that there was a debt due from the plaintiff to the testator, at the time of his death, amounting to the sum of 111,537 livres, 13 sols and 4 deniers, money of the Island of Martinique, which sum of money. at the time above mentioned, was of the value of \$13,519 63 current money of Mary-

land, which ought to be deducted from and set off against any thing which might be due from the testator's estate to the plaintiff, even if he had any claim which as a creditor he could sustain or support. He further gave evidence, that Pechier did, on or about the 7th of July, 1798, deliver over to the plaintiff, and his brother, Marc Anthony Terrier de Laistre, as heirs of the testator, the succession of the testator, and the papers relative thereto; and that the plaintiff, and his brother, have since had the same under their management, and in their possession; and that the plaintiff hath inter-meddled with the estate, and acted in respect thereof as heir; and also that the succession or estate of the testator is not insolvent. He also offered evidence to prove, that the acknowledgment entered in the books and papers of the testator, produced by him, of the sums for which his succession ought to account to the plaintiff, or in the French language "*dont ma succession doit lui tenir (ou faire) compte,*" only admits that such sums are to be settled with the plaintiff out of the estate real, personal and mixed, which he should leave at the time of his death, according as the laws of France, regulating the Island of Martinique, and there used and in force, authorizes and directs. He also gave in evidence, that the devise to him is not expressed to be under any secret trust. That to prove a devise to be a secret trust, by the French laws, the testimony of witnesses cannot be admitted; but that the supposed secret trustee is to answer, upon oath, whether he has lent his name or not directly or indirectly. That according to the French laws, regulating this case, the plaintiff has no interest or rights against the defendant, either as a debtor or legatee of the testator, or as debtor of the testator's estate, which he as a creditor, or in any manner, can enforce, unless the plaintiff had first solemnly repudiated and given up his right of inheritance to the succession, and had renounced all right

**211** \* as heir to the succession; and that the term "succession," in the French laws, means the whole estate real, personal and mixed, of every nature and description, whereof a testator dies seized or possessed. That the Island of Martinique, and the citizens thereof, are subject to, and regulated by the laws mentioned in the execution of the respective commissions which issued in this cause; and that the law is as stated in the respective commissions, by the witnesses examined on the execution of those commissions upon the legal interrogatories put to them on the execution of the commissions respectively; which interrogatories and answers thereto he offered in evidence. He also offered evidence, that the plaintiff, soon after the death of the testator, went to the Island of Martinique, and was residing there about a year. That no insolvency of the succession of the testator can be proved or established, so as to admit suits to be supported upon the grounds of an insolvency, unless the estate has been liquidated and settled by regular judicial proceedings in a Court of justice, where the accounts are settled,



and the insolvency shown, and that any person, who is to be affected by the insolvency, may, upon suit being brought against him, to be supported, in consequence of that insolvency, contest the same upon the trial, unless he was a party to the judicial proceedings establishing the insolvency, and had there an opportunity of being heard, and of contesting those proceedings. That the testator was indebted to divers persons in France, for debts contracted, in assignats, and otherwise, which were in his power to repay in assignats, which had become greatly depreciated; that in order to pay off his debts aforesaid, with the least sum possible, and thereby render his succession the more valuable to the plaintiff, and his other son, his heirs, he solicited the said remittances to be made to him, while in the U. S. and endeavored to have property transferred to him, to employ the same, as far as there should be a surplus after his own support, to make remittances to France to pay and discharge those debts; and that the said remittances were not endeavored to be procured, or his property sought to be transferred, to the U. S. to dispose of it contrary to the laws of France. He also gave in evidence what were the remittances the testator received in property, or otherways, while in the U. S., and that they were expended in the support of himself and \* family while in the U. S. and in remittances for payment of his debts. That assignats was a **212** species of paper money, or paper currency, issued under the authority of the French government, since the commencement of the French revolution, at different times, and which, when issued, were, or since being issued became, of much less value than gold or silver current coin, and that rating the value of dollars with livres in specie, the dollar in specie is equal to five livres tournois and five sols; whereas the dollar in specie has been, and is worth much more than the same number of livres tournois in assignats, according to the different state of depreciation of assignats. The plaintiff then, to prove that the French laws cannot apply to, or operate upon this case, gave in evidence, that the defendant took out letters testamentary in this State upon the estate of the testator situated therein, and that the money received into his possession, as above set forth, and belonging to the estate of the deceased, was money lodged by the deceased, in his life-time, in the U. S., and that the money, or goods and merchandise, from the sale of which it arose, was withdrawn from the French dominions by the testator in his life-time, and lodged in the U. S. for the express purpose of evading the laws of France and Martinique, and of disposing of them by his will to the prejudice of the plaintiff, and in such a manner as those laws expressly forbid. And the plaintiff also gave in evidence the will of the testator, proved by the defendant in the Orphans' Court of Baltimore County, on which letters testamentary were granted to him by that Court. The plaintiff, to prove that the debt for which this action is brought is an American debt, and not subject in any man-

ner to the operation of the French laws, gave in evidence, that the two sums of 12,000 livres and 28,000 livres, amounting to 40,000 livres, received from the plaintiff by the testator, through Madame Aubin, in Bordeaux, were obtained from the plaintiff by the testator, under an expectation held out by the testator of his employing them beneficially in the purchase and exportation of merchandise for the benefit of the plaintiff, and that the sum of 34,925 livres, part of the 40,000 livres, were actually invested in the purchase of merchandise, by the testator in France, on the 29th December, 1793, and that the merchandise was on that day actually shipped by the testator to

Philadelphia, \* and did arrive at Amboy, in the State of

**213** New Jersey, on or before the 22d of May, 1795, and were there received by the testator into his possession, and sold and disposed of for his own use and benefit, about that time. He also offered in evidence, that the sum of 40,000 livres, lent by him to the testator, were by him received with a view to the removal of the testator, and of the plaintiff, to the U. S., and to the repayment of the loan in the U. S. And for that purpose he gave in evidence a part of the will of the testator, made at Philadelphia on the 1st of April, 1795. He also gave in evidence the aforementioned memorandum, bearing date on the 30th of September, 1795; and proved that it was made in Philadelphia, in the U. S., and that at the time of making the memorandum, and also the will of the 1st of April, 1795, the plaintiff resided within the U. S., and was then known by the testator so to reside. And also to prove that the debt due to the plaintiff by the testator, as acknowledged in the will of the 1st of April, 1795, and by the memorandum of the 30th of September, 1795, was on the 14th of April, 1797, a debt due in the U. S. within the legal meaning and operation of the eleventh clause of the will of the 14th of April, 1797, and therefore chargeable on the legacy left to the defendant by the eleventh clause, the plaintiff gave in evidence, that from the 1st of April, 1795, until the 14th of April, 1797, and on those days respectively, the plaintiff constantly resided within the U. S., and was on those days, and during the whole of the period between them, known by the testator to reside in the United States; and that the words "in the said continent," or "*dans le dit continent*," in the eleventh clause of the will of the 14th of April, 1797, mean and were intended by the testator to express "within the United States." The plaintiff, to prove that by the French laws, if applicable to this case, he cannot be prevented from recovering in this action, gave in evidence, that by the laws, "as no man can bestow on another that which does not belong to himself, therefore every species of debt due by a testator, even those least favored, is preferred to every species of bequest by will;" and that by those laws an heir, with benefit of inventory, who is also a creditor of the deceased, to whom he is an heir, may recover his debt, and also receive his portion of the estate;

and that the children of a deceased \* person, or any of them, may by the said laws require that an inventory of the estate be made and completed, and that they be allowed a reasonable time to be settled by the Courts of competent jurisdiction after such completion, to make up their determination before they elect to renounce the inheritance altogether, or to take it as heirs with benefit of inventory, within which time they may elect to take the inheritance as heirs, with benefit of inventory, whereby they do not lose their rights as creditors. And to prove that the plaintiff is heir of the testator, with benefit of inventory, and hath done no act whereby he could be rendered heir pure and simple, according to the said laws, the plaintiff gave in evidence, that he hath not in any manner intermeddled with the estate of the testator in the Island of Martinique, nor received anything therefrom as heir, and that the administration of the estate hath always remained in the hands of, and been conducted by, Dominick Pechier of that island, the executor appointed by the will of the 14th of April, 1797, who hath made an inventory of the estate conformably to the laws of that island; and that the estate in the island is wholly insolvent, and unable to pay the debts chargeable thereon. That by the French laws, interest is chargeable on all mercantile debts and transactions, and on money lent for the purposes of commerce, from the time of such loans respectively. The plaintiff, to prove that the defendant cannot be considered as a legatee under the French laws, and the laws of the said island, admitting those laws to apply to this case, and to operate upon it, and therefore cannot avail himself of the character of legatee by way of defence in this action, gave in evidence, that by the said laws any legacy given to an illegitimate child, either directly or by a declared trust, to the prejudice of the legitimate children of the testator, is void, except as to such part of such legacy as the Courts of the place shall determine to be a reasonable subsistence for such illegitimate child, in proportion to the extent of the estate, and other circumstances; and that by the said laws all legacies given upon a secret trust, for whatever purpose, are absolutely void. And the plaintiff also gave in evidence, that the legacy given to the defendant, in and by the will of the 14th of April, 1797, was given on a secret trust for the benefit of a certain Cheri Terrier, an illegitimate son of the testator, \* and to the prejudice of the plaintiff, his legitimate son. The plaintiff, to prove that the will of the 14th of April, 1797, and the legacy claimed by the defendant under that will, have been and are annulled; and wholly set aside by a Court of competent jurisdiction in the Island of Martinique, offered in evidence an exemplification of a judgment or sentence rendered by the Supreme Court of that Island, which exemplification purports to be attested under the hand and official seal of the Grand Judge of the Islands, and is as follows: “7th of May, 1801. George the Third, by the Grace of God, King of England, &c. &c. To all present and to come,

greeting. Between Messrs. Terrier de Laistre, brothers, beneficiary heirs of their father, appealing from the sentence rendered in the Senecchausse of St. Pierre on the 20th March last, on the one part, and Mr. Duquesnay, as well in his own name, being a donee of his late wife, who was a private legatee of the late Mr. Terrier de Laistre, as acting tutor for the minor Chery, private legatee of the said Terrier de Laistre, defendant, on the other part, and also Mrs. Pigache, residing in St. Pierre, and Mr. De Sobry residing in the United States of America, defendants likewise, on the other part. And between Mr. Duquesnay in his quality of a donee of his said wife, who was a private legatee of the late Terrier de Laistre, appealing from the same decree, as to the main part thereof which condemns him to the costs, on the one part, and the said Terrier de Laistre, brothers, defendants, on the other part, and also Mrs. Pigache and Mr. De Sobry, likewise defendants, on the other part. And also Mr. Duquesnay, in his quality of tutor for the minor Chery, also appealing from the said decree, on the one part, and Messrs. Terrier de Laistre, brothers, in their said quality, defendants, on the other part, and also Mrs. Pigache and Mr. De Sobry, likewise defendants, on the other part. And also between Mrs. Pigache, appealing also from the same sentence, as to that part which has condemned her to the costs only, on the one part, and the said Terrier de Laistre, brothers, defendants, on the other part, and also the said Mr. Duquesnay, as well in his own name as in his quality of tutor for the minor Chery, and M. De Sobry, defendant likewise, on the other part. Seen, &c. &c. The Court having heard the king's attorney-general, acting in his conclusions, \* and Mr. Ducaurroy, counsellor, in his report pronouncing upon the appeal of the said Mrs. Pigache, and of Mr. Duquesnay, as well in his own and private name, as in his quality of tutor for the minor Chery, have annulled the said appeal with fine and costs. And pronouncing likewise on the appeal entered by Messrs. Terrier de Laistre, brothers, have annulled both the appeal and the object thereof—enacting and stating, as well upon the conclusions taken by them in the main action, as upon those of the appeal—Declare the testament and codicil of the late Terrier de Laistre, of the 1st of April, 1795, 14th April and 10th July, 1797, to be null and of no effect; in consequence, reject the demand in delivery of the legacies made to them by the said testament and codicil, and the costs, notwithstanding, to be paid out of the mass of the estate. Ordain, &c. Done in the Sovereign Council of Martinique, on the 7th of May, 1801. Delivered the present exemplification to citizen Dominique Pechier, merchant in St. Pierre, as executor of citizen Terrier de Laistre, at his request, on this 13th day of Germinal, 12th year of the French Republic, or on the 3d April, 1804, (old style.)

“LE CAMUS.

“Sealed on the same day.

“DEPAZ.

"We, Grand Judge of Martinique, certify all whom it may concern, that the above signature is that of C. Le Camus, Chief Secretary of the Court of Martinique, and that faith ought to be given to it as well in as out of judgment. We certify farther, that stamps are not used in this colony.

Given at Fort de France, the 13th Germinal, 12th year of (Seal.) the Republic. Sealed with our seal, and countersigned with our signature. "LE FESSIER, Grand Pres.

"By the Grand Judge,

"The Secretary,

FOUCHEY, Son.

"Louis Arcambal, consul of France for the State of Maryland, one of the United States of America, residing at Baltimore, certify, that Mr. Le Fessier de Grand Pre, who has signed the above legalization, is Grand Judge of the Island of Martinique; that the signature is truly his, and that faith ought to be given to it, as well in as out of judgment. Certify also, that the Grand Judge is the only \*authority existing in the French colonies for the legalization of judicial acts. 217

In faith of which we have signed these presents, and have thereunto (Seal.) affixed the seal of the consulate at Baltimore, the 6th Brumaire, year 13th, (28th October, 1804.) L. ARCAMBAL."

The plaintiff, to prove that the attestation was in fact under the hand and seal of the said Grand Judge, produced and read in evidence a deposition sworn in open Court, and admitted in evidence by consent of parties, so far as parol evidence is competent to prove the matters for which the deposition was so offered in evidence, which deposition is annexed to the exemplification, and is in the following words: "Personally appeared in open court, Antoin Baudouin, of lawful age, who being duly sworn, on his oath did say, that he is well acquainted with Le Camus, of Saint Pierre, in the Island of Martinique, whose signature is affixed to the paper hereto subjoined; and also with Le Fessier, *de grand pres*, of the said Island, whose signature is also affixed to the said paper, and is well acquainted with the hand-writing and signature of the said Le Camus and Le Fessier, *grand pres*, having seen them respectively write; and that the name Le Camus is the proper hand-writing and signature of the said Le Camus, and that the name Le Fessier, *grand pres*, is the proper hand-writing and signature of the said Le Fessier, *grand pres*. And, further, that he is acquainted with the seal of office of the Grand Judge of the Island and Colony of Martinique, and that the seal affixed to the said paper, and purporting to be affixed by the Grand Judge is the official seal; and that the said Le Fessier, *grand pres*, is now, and was, on the 13th of Germinal, in the 12th year of the French Republic, Grand Judge of the Island and Colony of Martinique; and that he the deponent being a French citizen, and a resident of the said Island of Martinique, he is well acquainted with the laws and constitution thereof, as far as relates to the powers and functions of

the Grand Judge, Military Commander and Prefect; and that the Grand Judge is, by the said Constitution and government, the supreme authority and chief of the government, as to all that relates to judicial papers and proceedings, and is the sole authority by the said laws and government whereby any judicial proceedings can be authenticated. And \* that he, this deponent, is not a lawyer **218** by profession, but a merchant, and derives his knowledge of the said Constitution and government from the common practice of the place, the general understanding, and his general information as a French citizen, and an inhabitant of the said colony. The deponent further says, that there is not any general seal for the said colony; the Captain General having one for all affairs relating to the military department; the Prefect one for all matters relating to the finances and supplies which belong to his department; and the Grand Judge one for all matters relating to the judicial department; and that he derives this knowledge from his own experience and transactions, and from his general knowledge of the said colony and government." The defendant objected to the reading of the exemplification as evidence, because the same was not legally authenticated, and because it does not contain the whole proceedings, and is not a full record of the whole proceedings which was before, and which had taken place in the Supreme Court of the Island of Martinique.

*Harper and Boyd*, for the plaintiff, contended, 1. That in proving a foreign judgment, proof of the seal of the Court, and hand-writing of the Judge, was sufficient. They cited *Henry vs. Adey*, 3 *East*, 221; *Moises vs. Thornton*, 8 *T. R.* 303; *Church vs. Hubbard*, 2 *Cranch*, 238; *Peake's Evid.* 72, 73, (notes,) 49; and the Act of 1785, ch. 46, s. 2. 2. That the record is full and complete according to the principles of the law of England—They cited *Peake's Evid.* 68; 5 *Bac. Ab. tit. Pleading*, 323; and 1 *Esp. N. P.* 6.

*Martin* (Attorney-General,) and *Purviance* for the defendant, cited *Peake's Evid.* 46, 47; 3 *Inst.* 173; *Gilb. L. E.* 17, 23; *Melan vs. The Duke of Fitzjames*, 1 *Bos. & Pull.* 141; and *Tallarand vs. Boulanger*, 3 *Ves.* 448.

CHASE, Ch. J. The Court are satisfied upon the subject, and are of the opinion that the mere showing the seal of a Court of our own State, in another Court of the State, is sufficient authentication of the judgment of the Court it purports to certify. But if it is a judgment of a foreign Court, the seal of the Court does not prove itself, but must be proved by testimony. The Court are of opinion, that **219** \* the testimony produced in this case is sufficient to prove the seal of office of the Grand Judge of the Island and Colony of Martinique. As to the record's not being full enough, the Court are to presume that the record produced contains all the proceedings in the Court of Appeals, and that it is a full record; and the

Court are of opinion that it is proper to be given in evidence to the jury. Besides, it is to be observed, that this record is not the matter in issue in this cause, but comes in collaterally. It seems to the Court, that as this is mere matter of inducement the same strictness is not necessary; but upon this point the Court do not mean to give an opinion. In the case of *Henry vs. Adey*, 3 East, 221, it was debt upon the very record produced. The Court, however, are of opinion, that this record is sufficiently authenticated, and ought to be read in evidence to the jury. The defendant excepted.

4. The counsel differed in their ideas of the manner in which they ought to proceed as to the proof of the French law.

*Martin* (Attorney-General,) for the defendant, contended, that when it is disputed as to what are the laws of a foreign country, evidence must be given to prove what are those laws; and if there is a different construction put upon them by the parties, the Court is to decide which construction is to prevail.

CHASE, Ch. J. seemed to concur in this idea of the Attorney-General, and said that the Court are to decide what is proper evidence of the laws of a foreign country; and when evidence is given of those laws, the Court are to judge of the applicability of such laws, when proved, to the case before the Court.

5. The defendant offered to read to the jury certain letters written to him by Dominique Pechier, (and admitted to be in his hand-writing,) for the purpose of controverting the testimony of the said Pechier, as he returned with one of the commissions which issued in this cause; but the plaintiff objected to the reading of those letters, because the testimony taken was under a commission obtained by the defendant, and he cannot invalidate his own testimony.

\* CHASE, Ch. J. The letters being admitted to be in the hand-writing of Mr. Pechier, the witness, the Court are of **220** opinion they may be read to the jury, for one purpose alone; that is to impeach the credit of the witness as to what he has sworn upon his examination under the commission, contradictory to the contents of the letters; but that the letters are not admitted as evidence to prove any particular fact, which may be contained therein.

6. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that a contract made in one country, with a view to the execution or performance of it in another, is governed in all things, both as to its essence and the mode of enforcing it, by the laws of the latter country.

CHASE, Ch. J. If the contract is in writing it will itself show where it is to be executed; but if it does not appear, by the face of it, the presumption is that it is to be executed in the country

where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country. But if the contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed.

7. The second bill of exceptions.—The plaintiff prayed the opinion of the Court, and their direction to the jury, that if they are of opinion, from the evidence before them, that the testator of the defendant was, on the 1st of April and the 30th of September, 1797, indebted to the plaintiff in the several sums stated in his account filed in this action, or any part thereof, and that the plaintiff at those several times resided within the U. S. and was known by the testator so to reside; and that he, on the two first above mentioned days, acknowledged the debts, or any part of them, and directed them, or any part of them, to be paid out of the estate after his death, and on the last mentioned day directed, in and by his will of that day, that all debts in the U. S. should be paid out of his property in the U. S. bequeathed to the defendant, then the plaintiff is entitled to recover the said sums, or such part thereof as were so acknowledged and directed to be paid, or the value thereof, in current money of this State.

**221** \* *Harper and Boyd*, for the plaintiff, cited *Thorn vs. Watkins*, 2 Ves. 36, 37.

*Martin*, (Attorney-General,) for the defendant, also cited *Thorne vs. Watkins*; *Bruce vs. Bruce*, 2 Bos. & Pull. 229, (notes;) and *Sinclair vs. Monsieur de France*, *Ibid*, 363.

CHASE, Ch. J. The Court cannot give the direction prayed for by the counsel for the plaintiff. The Court are of opinion, that the facts stated, and the acknowledgments, cannot change the nature of the contracts made between the plaintiff and the testator in Martinique, or prevent the construing the same according to the laws of France, so far as the same may be applicable to the contracts. If the contracts, by which the debt becomes due, were made in France, they must be governed by the laws of France. No acknowledgment of the debt due in this country can change the original nature of it. The great question depends upon what are the laws of France. If the plaintiff can establish his claim, according to the laws of France, no act of the testator can prevent his recovering it in this country. The plaintiff excepted.

8. The third bill of exceptions.—The defendant further offered in evidence, that the 34,925 livres and 14 sols, alleged to have been received by the testator in France, and invested in goods, and shipped as before mentioned, which goods were by the testator disposed of in the U. S. for his use, were part of the sum of 40,000 livres, advanced by the plaintiff to the testator in May and August,



1793, and by the testator received from Madam Aubin Blampre, and which are charged in the account exhibited in this cause, and constitute the two articles of 12,000 livres and 28,000 livres in that account, which are therein charged as received by the testator for the use of the plaintiff, and on which he has charged an interest from the time he states the sums to have been respectively received by the testator; and, therefore, that the plaintiff had elected to consider the whole of the 40,000 livres as money due to him from his father from the respective times he received it; and that the plaintiff did, on the 9th day of June, 1803, file the following account in this cause, as specifying the claims \* which he had against the defendant, as executor of the testator, for which he had brought **222** his suit, to wit:

"Benjamin De Sobry, Executor of Michael A. Terrier de Laistre, deceased,

To Lewis A. Terrier de Laistre, Dr.  
Currency. Dolls.

1792, Decr. 29. To 1,236 livres, money of the Islands, being the price of 4 slaves sold and delivered to the testator on my departure from Martinico to France, as by his written acknowledgment, dated 30th Nov. 1795, equal to.....	£561 16 4	\$1,498 18
Interest thereon from this day till 21st May, 1803, at 5 p. ct.....	291 15 10	778 12
1793, May 21, To 12,000 livres tournois, received by said testator this day for my use, as per his letter of this date, equal to.....	857 5 0	2,285 75
Interest thereon from this day till 20th May, 1803, at 5 p. ct.....	428 12 6	1,142 87
Aug. 1. To 28,000 livres tournois, received by said testator for my use this day, as per his letter of this date, equal to.....	2,000	5,333 33
Interest thereon at 5 p. ct. till 20th May, 1803.....	980 9 8	2,614 64
1795, May 22. To 3,440 livres tournois, received by said testator this day for my use, as per his two letters, one of this date, and the other of the 15th October, 1795, equal to...	245 14 3	655 23
Interest thereon at 6 p. ct. till 20th May, 1803.....	117 18	314 40
	<hr/> £5,483 11 7	<hr/> \$14,622 52

The defendant then offered in evidence, that in consequence of this account so filed, the defendant had taken out the three last commissions which were executed, in order to examine into the justice of the claims in the account stated, and the operation of the French laws thereon; and he gave in evidence the commissions, the returns thereof, and the evidence obtained thereon, and prayed that the Court would not permit the plaintiff to change the nature of his claim contrary to his own election deliberately made, \* and  
**223** contrary to his claims as exhibited by him to the defendant in his said account. The plaintiff also prayed the Court, and their direction to the jury, that if the jury should be of opinion, from the evidence before them, that 34,925 livres and 14 sols, were, on or before the 29th of December, 1793, received in France from the plaintiff, and to his use, by the testator, and were, on or about that day, invested by him in merchandises, at Bordeaux, in France, for the account and risk of the plaintiff; and that the merchandises were then and there, by the testator, shipped to the U. S. for the account and risk of the plaintiff, and that the merchandise did arrive in the U. S. some time in or before the month of May, 1795, and were then and there received by the testator into his possession, and sold and disposed of for his own use and benefit, and the price thereof paid to the testator in his life-time, then the plaintiff is entitled to recover the amount of money which the jury, from the evidence, shall believe that the testator received for the merchandise.

CHASE, Ch. J. The Court cannot give the direction to the jury as prayed by the plaintiff. The Court are of opinion, that the plaintiff is precluded, by his account filed, from going into evidence to establish his claim for the money had and received by the testator for his use, in a manner different from that in which he has elected, by his account, containing a notice of his claim, to consider the testator his debtor for his use. The plaintiff excepted.

9. The fourth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that if the sum remaining in the defendant's hands, and retained by him as a legacy, or any part thereof, is liable to be recovered from him, as a part of the succession of the testator, and to be made answerable for such debts of the testator as were contracted under the French laws, which have their force and effect according to the provisions of those laws, and which are to be paid out of the succession, according to the rules and regulations thereby established, the suit could only be prosecuted against him by and in the name of the plaintiff and his brother, if they have both jointly taken upon themselves the management and administration of the succession, or in the name of his  
**224** brother, Marc Anthony, alone, if he has alone taken upon \* himself the administration and management, and not in the name of the plaintiff alone, as the suit is now brought.

CHASE, Ch. J. The Court are of opinion, that any creditor may sue the executor *pro forma*, as he is called here, provided he shows himself to be a creditor under the laws of the country where the contract was entered into. That as long as assets remain in the hands of the executor *pro forma*, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, there to be distributed according to the laws of succession of the country where the person is domiciled.

The Court are of opinion, that personal property adheres to the person; that wherever the person is domiciled, the property goes in distribution, according to the laws of that country. Whatever fund in this country is answerable for debts, is answerable to all creditors alike, (provided they show themselves to be creditors,) according to the laws of this country.

If our laws give a preference to our citizens, the defendant should have pleaded that our citizens had that preference.

The plaintiff is to be considered as a creditor, and in no other capacity; and if he has not intermeddled, so as to prevent his recovery as such under the French laws, he must recover in this action.

The Court are of opinion, that if the jury should find, from the evidence, that the plaintiff, as heir pure and simple, or as beneficiary heir, has not intermeddled with the estate or succession of the testator, and that the testator was indebted to the plaintiff, at the time of his death, that then the plaintiff has a right to support this suit. But the Court do not mean to decide, that an intermeddling by the plaintiff in the quality of heir pure and simple, or as heir with the benefit of inventory, would defeat his right of recovery in this action, that question being still open.

The Court are of opinion, that the assets in the hands of the defendant, as executor of the testator, are liable to the payment of debts due to the citizens of France from the testator, contracted there, or in the colonies of France, and that the defendant will be only accountable to the testamentary executor, the heir pure and simple, or heir with benefit of inventory, for the surplus remaining, after \* payment of debts, which surplus is distributable according to the laws of France. The defendant excepted. **225**

10. The fifth bill of exceptions.—The defendant further offered in evidence, that the testator being a French citizen, and having his domicile in the Island of Martinique, died there, having first duly made the wills and codicils herein before mentioned and set forth, and that at the time of his death he was possessed of certain property in the U. S. and had certain debts due to him therein; that Pechier, in that Island, as testamentary executor, took upon himself the management and administration of the succession of the testator, according to the French laws; that the succession, according to the laws of France, is the whole mass of his estate, real, personal,

mixed, rights and claims, whatsoever and wheresoever, of which the deceased was seized or possessed, or to which he had right or title at the time of his death, and which, by the French laws, were answerable in the first place for payment of debts, and then of legacies, and after the payment of debts and legacies, the residue to be enjoyed by the heir of the deceased, if he had only one child, or if more than one, to be divided equally between them. That by the said law all the children constitute but one heir, and are equally entitled to the residue, where there is a residue. That Pechier, by taking upon himself the management and administration of the succession, was the person whose duty it was to take into his possession, and to collect, receive and obtain, the whole of the succession, and to pay and satisfy thereout all debts due from and claims against the succession; and afterwards to deliver over the residue to the heirs of the testator, unless the heirs, or some one of them, chose to take the administration and management of the succession out of the hands of Pechier. That by the French laws the heir or heirs, or either of them, have an exclusive right, in the first instance, to take upon themselves the management and administration of the succession, and if they do not, and the testamentary executor acts, yet they may, whenever they please, interpose and take upon themselves the management and administration of the succession. That the testator left two sons, his heirs, both of whom are now living, the plaintiff, and his brother named Marc Anthony Terrier de Laistre, and that they, sometime in the \* month of July in the

**226** year 1798, did take upon themselves, in the Island of Martinique, the management and administration of the succession; and that Pechier did then and there deliver up to them the succession as far as it had come into his hands; and thereupon it became the duty of the plaintiff, and his brother, to take into their possession the whole of the succession, and collect and obtain the debts, &c. constituting part of the same, and thereout to pay all debts and legacies. That the debts and claims for which this action is brought, were contracted and arose in the government of France, and are subject to the operation of the French laws, and payable out of the succession according to those laws, and in such manner as is by those laws provided. That he, the defendant, according to the wills and codicils, and with the assent of Pechier, while he had the management and administration of the succession, obtained letters of administration in due form of law, in this State, to collect the debts and other effects, which were in the U. S. and which constituted part of the succession, in order to pay thereout the debts by the will charged thereon, and to hold the residue agreeable to the dispositions of the testator, and the French laws operating thereon. That the sum remaining in his hands, after payment of the debts, is retained by him, he claiming the same as a legacy given him by the testator. That no creditor of the succession, or other person, can, by the French

laws, bring suit against, or have any claim against a legatee, who hath obtained his legacy for which he can prosecute any suit, unless the succession is insolvent, and that the insolvency must be established by judiciary proceedings in a French Court, of competent jurisdiction; and that there was no evidence given by the plaintiff of such proceedings having been had. The plaintiff further offered in evidence, that by the laws of France, and her colonies, a co-heir of a person deceased, with benefit of inventory, who is also a creditor of the deceased, preserves in all cases his rights as a creditor, and may recover his debt out of the estate of the deceased wherever he can find it, without prejudice to his rights as a co-heir; and that the plaintiff in this action never did act as co-heir of the estate of the testator, nor in any manner intermeddle with his estate. The plaintiff then, upon the whole statement in this case, prayed the opinion of the Court, and their \* direction to the jury, that if the jury should be of opinion, from the evidence before them, **227** that the testator did purchase from the plaintiff, in the Island of Martinique, sometime in or before the year 1793, four slaves, the property of the plaintiff, and did also receive from the plaintiff, on loan, at Bordeaux, in France, on or about the 21st of May, 1793, the sum of 12,000 livres, current money of France, and on or about the 1st of August, 1793, the further sum of 28,000 livres like money, and on or about the 22d of May, 1795, the sum of \$170, current money of the U. S., to be employed for the benefit of the testator, and accounted for with, or repaid to the plaintiff; and that the testator, at the time of his death, was possessed of personal property in this State, and elsewhere within the U. S. to the amount of \$13,092.68, and bequeathed the same to the defendant by his will, bearing date at Martinique, on the 14th of April, 1797; and that the defendant duly proved the said will in the Orphans' Court of Baltimore County, in this State, and obtained from that Court letters testamentary on the will, and took upon himself the burden and execution thereof, and received into his possession, as executor, the personal property of the testator, then the plaintiff is entitled to recover, as well the value of the slaves, as the several sums of money received by the testator, provided there be assets sufficient to pay the same, and if not, then so *pro rata*.

*Harper and Boyd*, for the plaintiff, cited *The Dutch West India Company vs. Van Moses*, 1 *Str.* 612; 2 *Huberus*, B. 1, tit. 3, p. 26, cited in *Emory vs. Greenough*, 3 *Dall. Rep.* 370, (note); *Melan vs. The Duke of Fitzjames*, 1 *Bos. & Pull.* 142; *Robison vs. Bland*, 2 *Burr.* 1077, 1078, 1083; *Imlay vs. Ellefsen*, 2 *East*, 455; *Negro Hector vs. De Kerlegand*, 3 *H. & McH.* 185; *Wright vs. Nutt*, 1 *H. Blk. Rep.* 152; *Folliott vs. Ogden*, *Ibid.*, 123; *S. C.* 3 *T. R.* 734; 3 *Bac. Ab.* 30; *Hunter vs. Potts*, 4 *T. R.* 182, 183, 184, 185; *Pigott vs. Mason*, in *Court of Chan.*; *Sinclair vs. Monsieur de France*, 2 *Bos. & Pull.* 364, (note);

*Mostyn vs. Fabrigas*, 1 *Cowp.* 174; *Dixon's Ex'rs vs. Ramsay's Ex'rs*, 3 *Cranch*, 324; *Talleyrand vs. Bounlanger*, 3 *Ves.* 448; *Thorn vs. Watkins*, 2 *Ves.* 36; 2 *Fonbl.* 442; and *Domat*, 349.

**228** \* *Martin*, (Attorney General) for the defendant, cited *Harper vs. Hampton*, 1 *H. & J.* 453; 2 *Huberus*, *B.* 1 tit. 3 p. 36; *Cumming vs. The State*, 1 *H. & J.* 340; *Melan vs. The Duke of Fitzjames*, 1 *Bos. & Pull.* 142; *Talleyrand vs. Bounlanger*, 3 *Ves.* 441; and *Vatell*, *B.* 2, ch. 8, s. 110, 111.

CHASE, Ch. J. delivered the opinion of the Court. The Court are of opinion, that it is a general principle, which admits of a few exceptions, that in construing contracts made in foreign countries, the Courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired, and the obligations created by it. That the remedy or mode of enforcing the contract, is to be conformable to the laws of the country where the action is instituted. *Dixon's Ex'rs vs. Ramsay's Ex'rs*, 3 *Cranch*, 323, 324.

The exceptions to construing contracts according to the *lex loci*, which at present occur, are .

First.—Where by the terms of the contract it is to be executed in another country; there the parties to it, by common consent, adopt the laws of that country as the rule of decision.

Secondly.—Where the contract is *contra bonos mores*, as for the price of prostitution—Such a contract, though legal in some countries, would not be enforced in England, or in this State.

The Court are also of opinion, that unless the jury should be satisfied, according to the laws of France, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, that then the plaintiff is entitled to recover whatever the jury may find due on the contracts made in France, according to the laws of France.

The Court are also of opinion, that as to that part of the sum which is claimed under the contract made in America, the plaintiff is entitled to recover, without any regard to the laws of France, whatever the jury may find due thereby.

The Court are also of opinion, that upon principles of common sense and justice, no part of the testator's estate is subject to distribution among his co-heirs, but the surplus or residuum which may remain after payment of all \* the debts and legacies; and **229** that a debt due to one of the co-heirs is as much entitled, on principles of justice, to payment, as a debt due to a stranger; and that it is incumbent on the defendant to prove to the jury that there is a law of France which extinguishes the right or claim of the co-heir creditor, with benefit of inventory, unless he renounces as co-heir.

(a) The Court are also of opinion, that the laws of France are matters of fact to be found by the jury, upon evidence to be produced to them; and, unless the jury find some law of France, which extinguishes the claim or right of recovery of the plaintiff, that the plaintiff has a right to recover in this case, whatever the jury may find to be due to him upon a full investigation of the evidence. The Court also informed the jury that it does not appear to the Court that there is any law of France which is a legal impediment to the plaintiff's recovery. The defendant excepted.

*Harper*, for the plaintiff, before the jury, upon the laws of France, cited 1 *Domat*, 346, 347, 348, 349; and 2 *Coutume de Paris*, 252, 299, 302.

*Martin*, (Attorney-General,) and *Purviance*, for the defendant, also before the jury, referred to the testimony taken under the several commissions issued in this cause. 2 *Pothier*, 116; 1 *Poth.* 77; 2 *Coutume de Paris*, Art. 300, 301, 253, 302, 303, 304, 307, 309, 317, 318, 344, and the commentary of Ferriere on those Articles; *Serres*, 304, 305, 400, 311, 312, 363, 309, 351, 393, 421, 315, 322, 323, 314, 308, 262; *Ordinance of Lewis XIV*, Art. 1, 4; 1 *Coutume de Paris*, Art. 179; 13 *Vin. Ab.* 50, 414; *Peake's Evid.* 48; and *Collet vs. Keath*, 2 *East*, 260.

Verdict and judgment for the plaintiff, and the defendant brought a writ of error to this Court.

The cause was argued before TILGHMAN, BUCHANAN, NICHOLSON and GANTT, JJ. by

*Winder*, for the plaintiff in error, and by

*Harper and Boyd*, for the defendant in error.

\* THE COURT concurred in the opinions of the General Court, in the first, fourth, and fifth bills of exceptions, taken by the defendant in that Court. 230  
*Judgment affirmed.*

#### HOLLINGSWORTH et ux vs. M'DONALD et al.

The *habendum* of a conveyance in trust, after vesting a life estate in R. P. uses the following expressions: "And from and after her decease, that T. P. and his heirs, forever, shall have and possess the said land and premises; and in case of his, the said T. P.'s death, without lawful issue, the said lands shall revert to, and be vested in, the said R. P. and her heirs, forever"—Held, T. P. took a fee tail, with a reversion in fee to R. P.

In a conveyance of a freehold or legal estate, technical words are appropriated by law to the creation, or limitation of particular estates; for

(a) This part of the Court's opinion was given by them after the argument of all the points of law in the cause, and while the Attorney-General was addressing the jury.

instance, to create an estate in fee the limitation must be to J. S. and his heirs, and to create a fee tail, to J. S. and the heirs of his body. The words, *de corpore suo*, are indispensably necessary, but may be supplied by words to the same effect, plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend. (a)

A *feme covert* cannot transfer or pass her interest in land to another, unless by fine, common recovery or deed executed and acknowledged according to the mode prescribed by the Act of 1715, ch. 47.

The acknowledgment of a deed by a *feme covert* grantor, held to be defective, the word "*fear*" being omitted in the certificate of acknowledgment, and no word of similar import or meaning substituted in its place; but held to be cured by the Act of 1807, ch. 52. (b)

A literal adherence to the form of such certificate is not essentially requisite; and the omission of words deemed essential can be supplied by the substitution of words equipollent, or of similar import and signification. (c)

A decree of the Chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review.

A bill of review lies after the decree is signed and enrolled.

A bill in the nature of a bill of review lies after the decree is made, but before enrolment. (d)

A decree must be considered as enrolled after it is signed by the Chancellor and filed by the register.

A bill of review will only lie for two causes: Error apparent on the decree, or for some matter relevant, existing at the time of the decree, and discovered since.

A bill of review cannot be supported for matter existing at the time of the decree and discovered since, without affidavit of such matter, and the existence of it at the time of the decree, to lay a foundation for applying to the Chancellor for his leave to file a bill of review, and obtaining such leave. (d)

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(a) Under Rev. Code, Art. 44, sec. 4, no words of inheritance shall be necessary to create an estate in fee simple, but every conveyance of real estate shall be construed to pass a fee simple estate, unless a contrary intention shall appear by express terms, or be necessarily implied therein. The nature of the estate conveyed, whether a trust or a use executed, is not determined so much by the terms used as by the object to be effected. *Hawkins vs. Chapman*, 36 Md. 83.

(b) Retroactive legislation to cure or confirm conveyances, or other proceedings, defectively acknowledged or executed, is sustainable on the ground that it operates, not upon the deed or contract by changing it, but upon the mode of proof only. But the deed of a *feme covert* not legally acknowledged is wholly inoperative as to her, and a curative Act of Assembly cannot impart life to it. *Grove vs. Todd*, 41 Md. 633. In this case *Hollingsworth vs. McDonald* is distinguished. See *Webster vs. Hall*, 2 H. & McH. 14, note.

(c) Approved in the following cases, where it was held that a literal compliance with a statute directing the form of a certificate of acknowledgment or of an affidavit, &c. is not necessary, but that such a compliance as meets and subverts the design of the statute is all that the law requires. *Young vs. State*, 7 G. & J. 260; *Warner vs. Hardy*, 6 Md. 537; *Friend vs. Hamill*, 34 Md. 302; *Marlow vs. Maccubbin*, 40 Md. 137.

(d) A decree is to be considered as enrolled when it has been signed by the Chancellor, and filed by the register, and the term has elapsed during



On petition suggesting proper matter supported by affidavit as the ground for filing a bill of review, the Chancellor exercises his judgment on the propriety of interfering or meddling with his decree for the cause disclosed, and grants or rejects the application accordingly.

which it was made. *Burch vs. Scott*, 1 G. & J. 426; *Pfeltz vs. Pfeltz*, 1 Md. Ch. 455; *Tabler vs. Castle*, 12 Md. 144; *Price vs. Bank*, 29 Md. 374. All orders and decrees in Chancery may be altered, revised, or revoked, during the term at which they have been passed, on motion or petition. *Burch vs. Scott*, 1 Bland, 112; *Daues vs. Thomas*, 4 Gill, 384; *Thruston vs. Devecmon*, 30 Md. 217. Or a decree may be revoked before enrolment by a supplemental bill in the nature of a bill of review. *Burch vs. Scott*, 1 G. & J. 424. Before filing such bill upon the ground of new matter discovered since the decree, the party must obtain leave of the Court upon a petition, verified by affidavit, stating that the new matter could not have been produced or used by the party at the time when the decree was made. *Hughes vs. Jones*, 2 Md. Ch. 289; 1 G. & J. 424. On an application for leave to file a supplemental bill in the nature of a bill of review, it is not enough that the new facts were not known before the hearing, but it must appear that the party could not have known them by the use of reasonable diligence. *Ridgeway vs. Toram*, 2 Md. Ch. 303.

A decree once enrolled cannot be opened except by a bill of review, or by an original bill for fraud, or by a petition on the ground that it was obtained by mistake or surprise, or by consent of the parties. *Burch vs. Scott*, 1 G. & J. 424; *Ducker vs. Belt*, 8 Md. Ch. 13; *Stewart vs. Beard*, *Ibid*, 227; *Pinkney vs. Jay*, 12 G. & J. 69; *Marbury vs. Stonestreet*, 1 Md. 152; *Pfeaff vs. Jones*, 50 Md. 269.

*Bills of review.* A bill of review, properly so called, lies against those who were parties to the original bill, and against them only, and must be either for error apparent on the face of the decree, or for some newly discovered matter. 1 Bland, 122. A bill of review for apparent error may be filed without obtaining the leave of the Court, and it may be brought by either of the parties to the original bill, or by a person not such a party, but whose rights are affected by it. *Ibid*. In the English Court of Chancery the proceedings in the cause are recited in the decree. In Maryland this practice has not prevailed, and to make a bill of review as effective as it is in the English Chancery, the proceedings in the cause should be the subject of revision on a bill of review in the same manner as if they were stated on the face of the decree. *Tomlinson vs. McKaig*, 5 Gill, 278, approving the case in the text. For the purpose of examining into errors of law the bill, answers and other proceedings are, in our practice, as much a part of the record before the Court, as the decree itself: for it is only by a comparison with the former, that the correctness of the latter can be ascertained. *State vs. Ramsburg*, 43 Md. 383, citing the case in the text. Where errors apparent of law are assigned, they must consist of some defect disclosed upon the record, which in law is sufficient to vitiate and avoid the decree. A merely erroneous conclusion or judgment of the Court will not answer. These are the proper subjects of redress upon an appeal, and not by a bill of review. *Bell vs. Gosnell*, 31 Md. 572. The opinion of the Court is not a part of the decree or record for error in which a bill of review will lie. *State vs. Ramsburg*, *supra*. When the want of jurisdiction in the Court is apparent on the record, a bill of review lies. *Fox vs. Reynolds*, 50 Md. 573. After a decree has been affirmed upon appeal, no bill of review would properly lie for error apparent on the face of the decree. *Pinkney vs. Jay*, 12 G. & J. 69. As to the practice on such bills see *Burch vs. Scott*, 1 G. & J. 426.

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint. The material facts were these—The complainant

The Federal procedure is similar, On a bill of review for error apparent, nothing can be examined but the pleadings, proceedings and decree, which constitute the record in the cause: the proofs cannot be looked into as they can on an appeal: and it cannot be shown that the Court deduced wrong conclusions of fact from the proofs. *Whiting vs. Bank*, 18 Peters, 6; *Putnam vs. Day*, 22 Wallace, 60; *Buffington vs. Harvey*, 95 U. S. 99; *Thompson vs. Maxwell*, *Ibid*, 391. The truth of matters of fact alleged in such a bill of review is not admitted by a demurrer thereto, if they are inconsistent with the decree. *Shelton vs. Van Kleeck*, 106 U. S. 532. As to appeal from a decree dismissing a bill of review see *Berrett vs. Oliver*, 7 G. & J. 191.

In the case of a bill of review on the ground of newly discovered matter, the party must first petition the Court for leave to file the bill. *Burch vs. Scott*, 1 Bland, 122; S. C. 1 G. & J. 424. The petition is addressed to the sound discretion of the Court arising out of the circumstances of each case. *Pfeltz vs. Pfeltz*, 1 Md. Ch. 455. The new matter must be something tending to prove what was in issue between the parties. 1 G. & J. 424. On such an application, whether the matter is in truth newly discovered or not, is a question which must be then traversed and finally determined, so as not to leave it open upon the bill of review itself. *Hodges vs. Mullikin*, 1 Bland, 503. If the new matter actually came to the knowledge of the party, or ought to have been known to him by reasonably active diligence so long before the decree as to have enabled him to have had the matter put upon the record at the hearing, no bill of review will be allowed. *Ibid*, and *Hughes vs. Jones*, 2 Md. Ch. 289. The limitation of time as to appeals from decrees of the Court, applies to the right of filing bills of review, and such a bill, filed nine months after the date of the decree, comes too late. *Pfeltz vs. Pfeltz*, *supra*. Cf. *Billingslea vs. Baldwin*, 23 Md. 85; *Whelan vs. Cook*, 29 Md: 1. As to the right to file bills of review where a decree has been made for specific performance against a non-resident defendant, see Rev. Code, Art. 64, sec. 28. As to bills of review in cases where an infant or person *non compos mentis* is interested, see Rev. Code, Art. 65, sec. 50.

*Petitions to vacate the enrolment of decrees.* In *Herbert vs. Rowles*, 30 Md. 278, the Court said that to the above rules there are well-founded exceptions, arising in cases not heard upon the merits, and in which it is alleged that the decree was entered by *surprise* or *mistake*, or under such circumstances as shall satisfy the Court, in the exercise of a sound discretion, that the enrolment ought to be discharged and the decree set aside. These exceptions are supported not only by the soundest reason, but also by the highest authority. The decree in such cases being by default, and not upon the merits, the cause of the default can never be the subject of inquiry until the decree has been pronounced, and generally not until after the term has passed. Without the exercise therefore of this power in the Court to vacate the enrolment, a party against whom a decree had been entered and enrolled by mistake or surprise, and without any laches on his part, would be without redress, however meritorious his defence may have been. A bill of review would be of no avail, because his claim to relief is not based upon error apparent in the decree, nor on account of newly discovered evidence: and unable to charge fraud in obtaining the decree, he could not file an original bill to vacate it upon that ground. Accordingly it is laid down by the most eminent elementary writers, and fully sustained by adjudged cases that where a case has not been heard on the merits the Courts will,

Rachel, (one of the appellants,) whilst she was *sole*, on the 21st of September, 1790, was seized in fee of the tracts of land called Rich Neck and Howard's Timber Neck. A marriage settlement took place between the complainants, on the 21st of September, 1790, and Lyde Goodwin was appointed trustee. This settlement was as follows: "This indenture, made the 21st of September, 1790, between Jesse Hollingsworth, of the first part, Rachel Lyde Parkin, of the second part, and Lyde Goodwin, of the third part;" and after reciting the intended marriage between the said Jesse and Rachel, stated, that the said Jesse granted, &c. to the said Lyde, and the said Rachel, with the consent and approbation of the said Jesse, granted, &c. to the said Lyde, his heirs and assigns, all those tracts of land called Rich Neck and Howard's Timber Neck, \* "to have and to hold the said lands," &c. "unto the said Lyde **231** Goodwin, his heirs and assigns, for ever. In trust nevertheless, and for the uses," &c. "That she the said Rachel shall have, hold, occupy, possess and enjoy, the said lands, with the rents, issues and profits thereof, for and during the natural life of the said Rachel, and the same convert and apply to her separate use and benefit, without any let, trouble or impediment, from the said Jesse, in as full and ample manner, to all intents and purposes, as if she the said Rachel had remained a *feme sole*, and unmarried; and from and after her decease, that Thomas Parkin, and his heirs, for ever, shall have and possess the said lands and premises; and in case of his the said Thomas' death, without lawful issue, the said lands and premises shall revert to, and be vested in, the said Rachel, and her heirs, for ever," &c. The marriage took effect, and on the 4th of January, 1796, the complainants, together with Lyde Goodwin, executed a deed to Thomas Parkin, the son of the female complainant by a

upon good cause being shown, exercise a discretionary power of vacating an enrolment and giving the party an opportunity of having his case discussed. See, to the same effect, *Bank vs. Eccleston*, 48 Md. 145; *Downes vs. Friel*, 57 Md. 531. The discretion to be exercised upon such applications must be regulated by law and precedent, and not a mere desire to let in a defence upon the merits. *Rust vs. Lynch*, 54 Md. 636. This discretionary power is applicable as well to the time when the petition is to be filed, as in other respects. *Bank vs. Eccleston*, *supra*. As to the affidavits in support of the petition, see *Gechter vs. Gechter*, 51 Md. 189.

Does a bill as well as a petition lie to vacate a decree obtained by surprise? *Oliver vs. Palmer*, 11 G. & J. 148; *Barry vs. Barry*, 1 Md. Ch. 20. Can a decree be vacated on petition, on the ground of *fraud*? *Gechter vs. Gechter*, *supra*. As to original bills to impeach decrees on the ground of fraud, see *Pinkney vs. Jay*, 12 G. & J. 83; *Marbury vs. Stonestreet*, 1 Md. 152. Under Rev. Code, Art. 71, sec. 40, all appeals from decrees and orders in equity must be taken within nine months from the date thereof, unless it shall be alleged on oath that such decree or order was obtained by fraud or mistake, in which case the appeal shall be entered within two months from the time of the discovery of the fraud or mistake. See *Ashton vs. Ashton*, 35 Md. 501.

former marriage, which purports to convey to him an estate in fee simple in the said lands, and was acknowledged as follows; "Baltimore County, *set.* On this 15th day of February, 1796, personally appeared Jesse Hollingsworth and Lyde Goodwin before us the subscribers, two justices of the peace for Baltimore County, and severally acknowledged the foregoing instrument of writing to be their act and deed, according to the true intent and meaning thereof. At the same time came Rachel, the wife of the said Jesse Hollingsworth, and being by us privately examined apart from and out of the presence and hearing of her said husband, did acknowledge the foregoing instrument of writing to be her act and deed, according to the intent and meaning thereof, and declared that she made and executed the same, and this her acknowledgment thereof, voluntarily and of her own free will and accord, without being induced thereto by threats of or ill usage from her said husband, or through fear of his displeasure." This acknowledgment was signed by the justices. Parkin, the grantee, died in possession of the lands in 1797, of full age, and by his will devised the same in fee to his mother, one of the complainants. Certain creditors of Parkin and M'Kenna filed a bill in the Court of Chancery against the complainants, under the devise to the mother as devisee of Parkin, or **232** as his heir of law, stating that \* Parkin died seized in fee of the lands; that they were his creditors; that Parkin and M'Kenna were insolvent, and praying a sale of the land. The complainants answered the bill, admitting Parkin to be seized in fee of the lands, and that he devised the same to his mother, one of the complainants. A decree for a sale took place: S. Chase, Junior, was appointed trustee for making the sale, who made a sale of part of the lands, and made a report thereof to the Chancellor, which was confirmed, by the consent of the complainants. After the sale made, and the confirmation thereof, the complainants alleged, they had discovered that Parkin never was seized of the lands in fee, but that the estate in fee belonged to the complainant, Rachel; and that the deed from the complainants to Parkin, was not such a deed as passed the estate of a married woman. The prayer of the bill was, that the Chancellor would decree the sales of the lands to be null and void, &c. and for general relief, &c.

HANSON, C. (October Term, 1805,) decreed, that the bill be dismissed, &c. From this decree the complainants appealed to this Court.

The cause was argued at December Term, 1806, before CHASE, Ch. J. TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Key*, for the appellant, contended, 1. That the deed of the 21st of September, 1790, being a marriage settlement, vested the fee of the

lands in Goodwin, as trustee, for the sole and separate use of Mrs. Hollingsworth, for life, of the rents, issues and profits thereof. 2. In trust for Parkin, as estate tail. 3. In trust of the remainder in fee to Mrs. Hollingsworth, and her heirs. 4. That no power of disposition is given by the trust deed of the lands therein mentioned. 5. That the deed of the 4th of January, 1796, does not pass any estate or interest from Mrs. Hollingsworth. 6. That an equitable estate can no more be conveyed by a *feme covert*, unless the law is complied with, than a legal estate can, if there is no power given in the trust deed pointing out a different mode. 7. That no act done by Mrs. Hollingsworth does divest her estate in the lands.

On the first, second, third, and fourth points, he insisted, that the trusts created by the deed of 1790, were not \* executed by the statute, and that where they were not, the terms of the trust must be governed by the intention of the grantor. That the legal effect and import, and the particular meaning and operation of that deed, created an estate tail in Parkin, and the lands were not answerable for his debts. To show that the words in the *habendum* of the deed created an estate tail, he cited 2 *Roll. Ab. tit. Grant*, 65, pl. 25; *Ibid*, 68, pl. 28; *Co. Litt.* 21 a; and *Shep. T.* 52, 75, 103, 113. 233

On the fifth point, he referred to the Act of 1715, ch. 47; *Webster's Lessee vs. Hall*, 2 H. & McH. 19; *Flanagan's Lessee vs. Young*, *Ibid*, 38; *Lewis' Lessee vs. Waters*, 3 H. & McH. 430; *Jacob's Lessee vs. Kraner*, 1 H. & J. 291; *Peddicoart's Lessee vs. Riggs*, *Ibid*, 293; *Hawkins' Lessee vs. Burriss*, *Ibid*, 513; *The Corporation, &c. vs. Hammond*, *Ibid*, 580; *Heath's Lessee vs. Eden*, *Ibid*, 751; and *Greene vs. Muse & Ennalls' Lessee*, (*ante* 62.)

On the sixth point, he cited *Shep. T.* 507; *Gilb. L. of Uses*, 1, 2, 244; *Watts vs. Ball*, 1 P. Wms. 109; 2 *Blk. Com.* 337; *Banks vs. Sutton*, 2 P. Wms. 713; *North vs. Champernoon*, 2 *Chan. Ca.* 78; and *Calvert's Lessee vs. Eden*, 2 H. & McH. 336.

*Harper*, for the appellee, contended, 1. That this was substantially a bill of review, on the ground of new matter discovered, and must be so considered; and in this view of the bill, it is liable to four objections—1st. It is not in time. 2d. It is without affidavit or leave. *Mitf.* 34. 3d. It is not for newly discovered matter. *Chan. Pr. tit. Bill of Review*; *Mitf.* 34. And 4th. If this could be considered as newly discovered matter, it is still not within the rule. It must be matter which the party had previously no means of knowing. *Ibid*.

2. That Mrs. Hollingsworth's acknowledgment of the deed of 1796, is sufficient, the Act of 1715, ch. 47, not prescribing a formula which must be strictly pursued. *Webster's Lessee vs. Hall*, 2 H. & McH. 19; *Pattison's Lessee vs. Chew*, 1 H. & J. 587, (*note*;) *Gittings' Lessee vs. Hall*, in this Court, on appeal.

3. That Parkin, under the deed of 1790, had a remainder in fee simple, and not in tail; and that such a limitation, applied in a deed to a

legal estate, either at common law, or by way of use, would give a fee simple, \* he cited 5 *Blk. Com.* 107; *Litt. sec.* 31; *Co. Litt.* 21, 27  
**234** *b*; *Abraham vs. Twigg*, *Cro. Eliz.* 478; *Idle vs. Cooke*, 2 *Ld. Raym.* 1146; 1 *Roll. Ab.* 838; *Paramour vs. Yardly*, *Plow.* 541; *Litt.* 258; *Turnman vs. Cooper*, *Cro. Ja.* 476; *Leigh vs. Brace*, *Carth.* 343; 8 *C. 5 Mod.* 266; *S. C. 1 Ld. Raym.* 101; *S. C. 3 Salk.* 337. That trust estates are governed in their creation, limitation and extent, by all the same rules of construction, which apply to legal estates, he cited 2 *Blk. Com.* 337; *Shep. T.* 507; *Duke of Norfolk's Case*, 3 *Chan. Ca.* 48; *Philips vs. Philips*, 1 *P. Wms.* 35; *Watts vs. Ball*, *Ibid.* 109; *Banks vs. Sutton*, 2 *P. Wm.* 713; *Jones vs. Morgan*, 1 *Bro. Chan. Ca.* 222; *Philips vs. Bridges*, 3 *Ves. Jr.* 127; *Bagshaw vs. Spencer*, 2 *Atk.* 578; *Garth vs. Baldwin*, 2 *Ves.* 646; 2 *Fonbl.* 16; 1 *Fearne*, 166, 170; *Glenorchy vs. Bosville*, *Ca. temp. Finch*, 3; *Ward vs. Bradley*, 2 *Vern.* 23; *Peacock vs. Spooner*, *Ibid.* 195; *Dafforne vs. Goodman*, *Ibid.* 363; *Webb vs. Webb*, 1 *P. Wms.* 132; *Theebridge vs. Kilburne*, 2 *Ves.* 237; 2 *Fearne*, 302. That admitting the acknowledgment to be ineffectual, and Parkin to have only an estate tail, with remainder over in fee to his mother, until the interest during her life is at end, the estate is liable for Parkin's debts; and that this application, if free from all other objections, is premature. He cited Lord Hardwicke's observations in *Pawlet vs. Delaval*, 2 *Ves.* 666.

*Martin*, in reply. 1. As to the question what estate was created by the deed of 1790, he cited *Co. Litt.* 21 *a*; 1 *Roll. Ab.* 838; *Turnman vs. Cooper*, *Cro. Jac.* 476; *Bamfield vs. Popham*, 1 *P. Wms.* 57, (*n*;) *Perkins*, *sec.* 173. 2. He contended that the Court of Chancery determines what estate passes under the trusts; and whatever interest that Court determines to exist, goes as a legal estate at law. He cited 5 *Bac. Ab. tit. Uses & Trusts*, 308, 352, 354, 379, 386; *Gilb. Law of Uses*, 161, 162. 3. As to what is an executed, and what is an executory trust, he cited 2 *Fonbl.* 50, (*note*;) *Ibid.* 400, (*note q*.) 4. As to the legal effect of the deed of 1796, he referred to the Act of 1715, ch. 47. *Wilson on Fines*, 20; *Nicholson's Lessee vs. Hemsley*, 3 *H. & McH.* 409; and *Sonday's Case*, 9 *Coke*, 127. 5. That if a *feme covert* holds a separate estate under a marriage settlement, she cannot \* convey in any other mode than that prescribed by law,  
**235** where there is none pointed out in the marriage settlement. He cited 2 *Bac. Ab. tit. Curtesy*; *Hearle vs. Greenbank*, 3 *Atk.* 695; 8 *C. 1 Ves.* 298; *Roberts vs. Dixwell*, 1 *Atk.* 607. 6. Whether the appellants have a right to bring the present bill, if considered as a bill of review upon discovery of new facts, or as an original bill, he cited *Mitf.* 35, 74; 1 *Harr. Chan. Pr.* 306; *Hind's Pr.* 38; *Anonymous*, 3 *Atk.* 17; *Norris vs. Le Neve*, *Ibid.* 26, 35, 38. *Curia adv. vult.*

At the present term the opinion of the Court was delivered by

CHASE, Ch. J. In this case, the first question to be decided by the Court is, what estate vested in Thomas Parkin, in the land in

question, under and in virtue of the deed from Jesse Hollingsworth, and Rachel Lyde Parkin, to Lyde Goodwin, executed on the 21st of September, 1790?

The question arises on the following words in the *habendum* of the deed: "And from and after her decease, that Thomas Parkin, and his heirs, for ever, shall have and possess the said lands and premises; and in case of his the said Thomas' death without lawful issue, the said lands shall revert to and be vested in the said Rachel, and her heirs, for ever."

It is admitted that Lyde Goodwin, under this deed, took a fee simple in the lands in question, in trust for Rachel Parkin, during her life, and that the words before recited, would in a will create an estate tail in Thomas Parkin; but it is objected that those words in a deed will not create an estate tail, and that a fee simple passed to Thomas Parkin.

It is without doubt that the above words in a will would give a fee tail, because no technical words being necessary to create such estate. The intention expressed by the words of the testator must prevail if not inconsistent with some rule or principle of law; and the intention is plain here that Thomas Parkin was to take a fee tail.

In a deed or conveyance of a freehold or legal estate, technical words are appropriated by law to the creation or limitation of particular estates; for instance, to create an estate in fee, the limitation must be to J. S. and his heirs, and to create a fee tail, to J. S. and the heirs of his body. \* It is established that the words *de corpore suo* are not indispensably necessary, but may be supplied by words equipollent or tantamount, plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend. **236**

In this case the limitation is to Thomas Parkin, and his heirs, and in case of his death without lawful issue, to revert to Rachel Parkin, and her heirs. These words are comprehended in one sentence, and contain the two requisites necessary to constitute an estate tail. The subsequent words, "in case of his death without lawful issue," qualify and restrain the generality of the precedent expressions, (to Thomas Parkin, and his heirs,) and point out, unequivocally and plainly, the heirs intended to inherit, and confine them to heirs of his body. Thomas Parkin could not die without heirs, as long as he had lawful issue; and in this case the words lawful issue, heirs of his body, and issue of his body, as words of limitation, expressive of the quality of the estate to be granted, are of the same import and signification, and necessarily designate the heirs intended to inherit, and do convert the fee simple created by the first words, into a fee tail; for Thomas Parkin could not have issue, or lawful issue, but of his body.

The Court being of opinion, that an estate tail vested in Thomas Parkin, with the reversion in fee to Rachel Lyde Parkin, under the deed; and being also of opinion, that the said words in a conveyance of a freehold estate, would create a fee tail, it becomes unnecessary to decide the question, so ably and learnedly discussed by the counsel, how far the Court is at liberty, in expounding a deed of conveyance creating or limiting an use or trust at common law, and not united to the possession by the statute of uses, to reject the rules established by the common law, in the construction of a conveyance of a freehold estate, and to give an exposition according to the intention of the parties, as in a will.

It is also unnecessary to decide on the nice and refined distinctions between trusts executed and executory; and the Court give no opinion on those questions.

As to the operation of the deed of 1796. It is unquestionable that a *feme covert* cannot transfer or pass her interest in land to another, unless by fine, common recovery, or deed executed and acknowledged according to the mode \* prescribed by the Act **237** of 1715; and the question to be decided by the Court is, whether the acknowledgment of the deed by Mrs. Hollingsworth is conformable to the said mode, and effectual to render the deed operative in law to convey her interest in the lands in dispute to her son Thomas Parkin?

The Court are of opinion, that the acknowledgment is substantially defective, the word "fear" being omitted in the certificate of the acknowledgment, and no word of similar import or meaning substituted in its place. The word *fear*, in that part of the certificate, means a particular specific kind of fear, and signifies that she makes her acknowledgement without being induced thereto by *fear of ill-usage* by her husband. The true and genuine meaning of the words, "without being induced thereto by fear or threats of ill-usage by her husband," being fear of ill-usage, threats of ill-usage, or actual ill-usage.

The Court, in thus giving their opinion, do not decide that a literal adherence to the form of the certificate is essentially requisite, and that the omission of words deemed essential, cannot be supplied by the substitution of words equipollent, or of similar import and signification. But the Court are of opinion, that the deed is rendered valid and effectual to pass the land mentioned therein, to Thomas Parkin, in fee simple, by the Act of Assembly, entitled, "An Act for quieting possessions, and securing and confirming the estates of purchasers," passed at November Session, 1807, ch. 52, it appearing by the certificate of the acknowledgment of Rachel Hollingsworth, that she made her acknowledgment privately and willingly, out of the presence and hearing of her husband.

As to the question, whether the present bill can be sustained?



The decree of the Chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review.

A bill of review lies after the decree is signed and enrolled.

A bill in the nature of a bill of review lies after the decree is made, but before enrollment.

A decree must be considered as enrolled, after it is signed by the Chancellor, and filed by the register.

\* A bill of review will only lie for two causes—Error apparent on the decree, or for some matter relevant, existing at the time of the decree, and discovered since. Nothing appears on the proceedings on the first bill to support the position that there is error apparent on the decree, the deeds not being made a part of the proceedings. **238**

It cannot be supported for matter existing at the time of the decree, and discovered since, without affidavit of such matter, and the existence of it at the time of the decree, to lay the foundation for applying to the Chancellor for his leave to file a bill of review, and obtaining such leave.

On petition suggesting such matter, supported by affidavit as the ground for filing a bill of review, the Chancellor exercises his judgment on the propriety of interfering or meddling with his decree, for the cause disclosed, and grants or rejects the application accordingly. These requisites, for laying the foundation for the present bill, not having been complied with, the Court are of opinion, that the decree of the Chancellor, dismissing the bill, be affirmed, with costs to the appellee.

*Decree affirmed.*

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NORWOOD *vs.* NORWOOD.

A. and B. entered into a bond to C. on which separate suits were brought, and judgments recovered. B. pays both judgments, and, as the surety, obtains an assignment of the judgment against A. from the attorney of C. and issued an execution in his own name as assignee of C. against A. on the judgment against him, for the whole sum of money recovered. A. filed a bill in Chancery against B. charging that the bond was for a joint debt due from both of them; that he had paid nearly one-half of the debt, and that B. was liable for the other half—also, that B. was indebted to him in a sum of money recovered by a decree in Chancery, which he refused to discount. Prayer for general relief, and for an injunction to stay the execution. Injunction granted. B. by his answer, denied that the debt was a joint one; that he was the surety of A. in the bond. He admitted the decree obtained, but that he had appealed therefrom, which appeal was depending and undetermined. *Decreed*, that B. was a co-principal with A. in the bond to C. on the ground that he received, in specifics, as his share of the personal estate of his father, (for whose debt the bond was given,) as a consideration for his becoming a principal in the bond with A. That A. be charged with one-half of the amount of the bond, with interest, and credited with the payments

by him made, and the amount of the decree since finally made in his favor, and be also charged with B's distributive share of his father's estate, with interest. By which a balance was due from A. to B.—*Decreed*, that the injunction be dissolved, and that B. be permitted to take out execution against A. on the judgment at law, for the said balance, with interest, &c. And that the execution be sued out in the name of C. for the use of B. (a)

APPEAL from a decree of the Court of Chancery. The bill, filed by the complainant, Edward Norwood, (now appellee,) on the 31st of July, 1800, stated, that he and the defendant Samuel Norwood, (now appellant,) being jointly indebted to D. Dulaney, on the 20th of April, 1784, gave to him their joint bond, conditioned for the payment of £314 sterling, and £320 current money, with interest. That the defendant having omitted to pay any part, suits were brought against each on the bond, and judgments obtained. That the complainant paid £100 11, current money, \* on the 17th of September, 1788, **239** and \$1,000 on the 28th May, 1795. That the balance due from him on the judgment, after the deduction of the payments, amounted, with interest and costs, on the 29th of July, 1800, to £321 5 10. That the defendant, contriving to injure and oppress the complainant, obtained an assignment of the whole judgment against the complainant, and issued an execution thereon in his own name, as assignee, and threatens to levy the whole amount of the judgment, although the defendant is himself liable for one-half. That the defendant is indebted to the complainant in £776 15 6 current money, exclusive of interest and costs, recovered by the latter of the former by a decree

(a) Affirmed in *Sotheren vs. Reed*, 4 H. & J. 307, and in *Hollingsworth vs. Floyd*, 2 H. & G. 91. Payments by sureties are highly favored by our laws, and have been liberally dealt with by the Court. A payment in full entitles a surety to an assignment of the judgment against the principal by the Act of 1788, c. 32, (Code, Art. 9, sec. 6,) *Hollingsworth vs. Floyd*, *supra*. When the surety on a bond has satisfied the same, he is entitled to claim from the principal no more than he has actually paid in satisfaction, and he cannot recover this by a suit in the name of the obligee against himself and his co-obligor, but must demand an assignment of the bond under Code, Art. 9, sec. 5. *Martindale vs. Brock*, 41 Md. 572. In this case the Court doubted whether it was competent for the attorney of the creditor to make the assignment. But by the Act of 1880, ch. 161, it is provided that when any person shall recover a judgment against the principal debtor and surety, and the amount due on the judgment shall be satisfied by the surety, the creditor, or his attorney of record, shall assign the same to the surety, and such assignment being filed in the Court where the judgment was rendered, the assignee shall be entitled to execution in his own name against the principal for the amount so paid by the surety. The same Act provides for the assignment of a judgment against several sureties to the one or more of them satisfying the same. The case in the text is examined in *Peacock vs. Pembroke*, 8 Md. 350. Cf. *Colegate vs. Savings Instn.* 11 G. & J. 114; *Carroll vs. Bowie*, 7 Gill, 34; *Smith vs. Anderson*, 18 Md. 520; *Crisfield vs. State*, 55 Md. 192; *Berry vs. Nicholls*, *post*, m. p. 508.

of the Court of Chancery. That the defendant refuses to discount out of the judgment any part of the money due to the complainant. Prayer for general relief, and an injunction. Injunction granted, &c. The answer of the defendant stated, that on the 20th of April, 1784, at the pressing solicitation of the complainant, he became his security to D. Dulany, in the bond stated in the bill, and which bond was given to renew a former bond of the complainant to Dulany, for the sole and proper debt of the complainant, contracted about the year 1772. That the defendant neither directly nor indirectly received or participated in the benefit of any part of the consideration of the said debt, and that he signed and executed the bond as the security of the complainant, and he positively denies the allegation of the complainant, that the same was for a joint debt, or that the defendant ever received full or any satisfaction for the same. He admits the payments stated by the complainant, and the institution of the suits, and recovery of judgments on the bond, and that he the defendant hath obtained, as the surety of the complainant, an assignment of the judgment recovered against the complainant, as was lawful and just for him to do, and he claims and insists, that he, as surety of the complainant, hath a legal, just, and equitable title, to proceed to recover the balance thereon due. He admits that the complainant hath obtained a decree in the Court of Chancery against him for the sum stated, but he insists that the complainant cannot justly claim any discount for or by reason of that decree, which is unjust, and upon which he hath prosecuted an appeal to the Court of Appeals, and where he confidently expects a reversal of the decree. He denies all fraud, &c. \* The defendant gave notice of a motion to dissolve the injunction at the next term. 240

HANSON, C. at the next term, on the motion to dissolve, passed an order continuing the injunction.

There was much testimony taken, and it was the object of the complainant to prove that he had paid to the defendant more than his proportion of his father's estate, whose executor the complainant was, and that the debt due to Dulany was from the estate of the father; and that the bond was executed by them as joint obligors, each to pay one-half. The judgments obtained by the executrix of Dulany against E. and S. Norwood, (the payments made being deducted,) in consideration of the principal sum of money, and interest due thereon, being paid by S. Norwood, all the right, &c. of the plaintiff to the judgments, was assigned unto S. Norwood on the 24th of July, 1800, by William Cooke, Esquire, attorney for the executrix of Dulany; and in virtue of that assignment, a writ of *feri facias* issued on the judgment against E. Norwood, in the name of S. Norwood, as the assignee of the executrix of Dulany, returnable to the General Court at October Term, 1800.

HANSON, C, (June Term, 1803,) passed the following interlocutory decree: The case is that of one of two obligors in a bond obtaining an assignment of the judgment on the bond, and endeavoring to avail himself of it as a mere security; whether or not he was such, is the main, if not the only question in dispute. As it does not appear from the face of the bond that the assignee was only a security, his answer to the bill is not to be considered as standing good if it be contrary to the testimony of at least two witnesses, or of one witness, and strong equitable circumstances. Whether or not he was a mere surety must then be determined from the testimony.

The Chancellor must declare that the testimony is by no means such as to convince him that S. Norwood, joined in the bond with E. Norwood as a mere security. But supposing he did, and that no part of the consideration was by him received from Dulany, the obligee, if he received a consideration from E. Norwood for joining in the bond, he is surely to be charged with it.

**241** \* Upon the whole, the Chancellor conceives himself obliged to decree; and it is, &c. decreed, that the parties account with each other before the auditor; and that the auditor of this Court state and return the account to this Court, charging E. Norwood with one-half of the bond to Dulany, in the bill and answer mentioned, and giving him credits for payments appearing to have been by him made, charging interest on the principles in this Court established, and striking the balance.

But still the Chancellor is by no means satisfied with respect to the merits of the cause. It appears that S. Norwood received upward of £269 in specifics, as his share of the personal estate of the father, when a far less sum was due to him; and it is probable that the said sum was the consideration for his joining E. Norwood in the bond to Dulany. The case is wonderfully perplexed and confused, probably from the want of keeping regular accounts. If that sum was the consideration, and if, after deducting S. Norwood's share of the personal estate, it was inferior to the one-half of the bond to Dulany, surely S. Norwood is entitled to credit for the deficiency. Let then the auditor state an account in a different way charging E. Norwood with the whole of the bond to Dulany, giving him credit for payments, and likewise for the delivery of the specifics to S. Norwood, deducting S. Norwood's share of the personal estate. The account, when returned shall be subject to the opinion of the Chancellor, on exceptions, &c.

The truth is, that in the present state of affairs the Chancellor does not feel himself competent to pass a final decree to satisfy himself. He knows not whether in the account in another cause between the parties, E. Norwood hath not had credit for the said sum. Let the auditor examine the former account. If already E. Norwood has received a credit for the said sum, probably he ought

to be charged with the whole of the bond to Dulany. However the whole is open to examination and controversy.

The auditor having reported, and both parties having excepted to some one of the accounts stated.

HANSON, C. (July 25, 1804.) After hearing the exceptions of the parties, and the ingenious arguments of counsel relative to the statements of the auditor made under the decree of the 3d of August last, the Chancellor \* has bestowed the most anxious attention to, and has long deliberated on a cause, than which he never **242** attended to one more perplexed and difficult. The testimony is very far from being satisfactory, and yet it appears unquestionably entitled to some weight.

Upon the whole, the Chancellor conceives it best to consider the complainant as the sole principal in the bond to Dulany, (the evidence in the cause showing that it was given on account of bonds by him passed without the defendant,) and to charge the defendant with £269 6 4, twelve months after the day of the date of probate of the last will of E. Norwood, deceased. It is accordingly ordered, that the auditor state another account differing substantially from account No. 2, by him endorsed and filed, &c.

And, on the 27th of July, 1804, it was further decreed, that the injunction should be dissolved, provided that no more be considered due or levied by S. Norwood, by his execution on the judgment at law assigned to him, than the costs at law, and the sum of £278 9 0, with interest, &c. But whereas E. Norwood, by his petition this day, hath stated on oath, what is true to the Chancellor's knowledge, that he hath a decree against S. Norwood for a sum which, with the lawful interest, is superior to the aggregate sum of £303 11 6, due to S. Norwood from E. Norwood, it is, conformably to the petition, adjudged, &c. that S. Norwood be further enjoined not to proceed on his execution at law until the further order of the Chancellor, it being reasonable that there be a discount between the parties. From which decree the defendant appealed to this Court.

The cause was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

Johnson, (Attorney-General,) T. Buchanan, and Harper, for the appellant.

\* Key for the appellee insisted that the appellant must prove, **243**  
1st. That he was a surety; and 2d. That he has a regular and legal assignment. That the assignment was made by the attorney, and not by the principal creditor or plaintiff in the judgment, as required by the Act of 1763; and that the execution, issued in the name of the appellant, as assignee of the plaintiff, in the judgment, was not justified by the Act under an assignment made by the attorney of the plaintiff, and in which it was not stated that the appellant was the surety.

CHASE, Ch. J. (TILGHMAN and GANTT, JJ. concurred.) The Court are of opinion, that the decree of the Court of Chancery be reversed, with costs to the appellant, and that the injunction be dissolved. That the clerk of this Court state an account between the parties. The Court are of opinion, that the appellant was co-principal and joint debtor in the bond with the appellee to Dulany, on the ground that the specifics, to the amount of £269 6 4, were delivered and paid to the appellant by the appellee, as a consideration for the appellant's becoming a principal with the appellee in that bond. Therefore charge the appellee with one-half of the bond, &c. &c.

By the statement made, as directed by the Court, a balance remained due to the appellant, (after giving the appellee credit for the payments he had made on the judgment, and the amount of the decree by him obtained against the appellant on the 22d of February, 1803, and charging him with the appellants distributive share of his father's \* estate, with interest, &c.) of £318 12 5, current money. **244** The Court therefore decreed, that the appellant be permitted to take out execution against the appellee on the judgment, &c. for the sum of £318 12 5, current money, with interest from the 19th of January, 1808, and the costs at law; and that the execution be sued out in the name of Rebecca Dulany, as executrix of Daniel, for the use of the appellant. *Decree reversed, &c.*

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GUNBY vs. SELBY.

In an action of debt upon a guardian's bond, dated in 1797, the plaintiff proved by a witness, that land of the plaintiff was during his minority, rented by the guardian to the witness, in 1791, and that the rent was afterwards lessened, in consequence of an agreement between them, that the witness should take charge of the defendant's stock upon the land—Held, that such evidence was inadmissible.

APPEAL from Worcester County Court. Debt on a guardian's bond, dated in 1797. At the trial the plaintiff, (the appellee,) offered a witness to prove that the lands, the property of the plaintiff, were, during his minority, rented by the defendant, (now appellant,) to the witness, in 1791, and that the rent agreed upon between the witness and defendant was lessened in consequence of an agreement between them, that the witness should take charge of the defendant's stock upon the lands. The defendant objected to the admission of such evidence, as incompetent. But the Court, [POLK, Ch. J.] was of opinion, that it was proper to be given to the jury, and to examine the witness as to the said facts; and the same was accordingly done. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before TILGHMAN, BUCHANAN and GANTT, JJ. by

*Whittington and Wilson*, for the appellant, and by

*J. Bayly*, for the appellee.

*Judgment reversed.*

EMORY'S Adm'r *d. b. n. vs.* THOMPSON'S Ex'x.

A copy of a paper, purporting to be an additional inventory to the inventory of the estate of the deceased, certified under the hand and seal of the Register of Wills to be a true copy taken from the original additional inventory offered, (not proved,) by the administrator, and lodged in the office of the register—Held not to be competent evidence to charge the administrator with the amount of the goods and chattels therein mentioned.

An original paper, purporting to be an "additional inventory to the inventory of the deceased, offered by the administrator," proved to be in the hand-writing of a person who acted as a clerk for the administrator, and endorsed "additional inventory," in the hand-writing of the administrator, found among the papers in the office of the Register of Wills, wrapped up in the original inventory of the estate of the deceased—Held to be competent evidence to charge the administrator with the several sums of money specified in the said paper, as part of the goods and chattels of the deceased.

APPEAL from the General Court. The appellant brought an action of debt upon the administration bond of Ezekiel \* Forman, (who was administrator with the will annexed of Sarah Emory) **245** against the executrix of John Thompson, who was the security of Forman in the said administration bond. The defendant, (now appellee,) pleaded performance, specially, and the plaintiff replied non-performance, stating a bequest by Sarah Emory to the plaintiff's intestate, of sundry parts of her personal estate, which had been bequeathed to her by her deceased husband, over and above her thirds; that after paying the debts, &c. there remained a residuum of £1,000 current money, &c. Rejoinder, that after paying debts, &c. there did not remain of the estate, &c. any residue, but that the whole estate was paid away in payments of debts, &c. Issue joined.

1. At the trial at September Term, 1805, the plaintiff, having given in evidence a copy of the inventory of certain goods and chattels of Sarah Emory, then offered an official copy of a certain paper, purporting to be an additional inventory to the inventory of her estate, and certified under the hand and seal of the register of wills in and for Queen Anne's County, as evidence to charge Ezekiel Forman, in his capacity of administrator of Sarah Emory, with the several sums of money therein specified, as part of the chattels, rights and credits, of Sarah Emory. The certificate was thus: "Additional inventory to the inventory of Mrs. Sarah Emory's estate, offered by Ezekiel Forman, the administrator." [Here follow the

articles, &c.] "Maryland, Queen Anne's County, to wit: I do hereby certify, that the above and foregoing instrument of writing is a true and perfect copy, as copied from the original additional inventory of Sarah Emory, offered by Ezekiel Forman, administrator, and lodged in my office. In testimony," &c. Signed by the present register the 16th of August, 1803. The defendant objected to the certificate, and contended that the same was not competent evidence in law to charge Ezekiel Forman with the amount of chattels and credits therein mentioned, as proposed by the plaintiff, or with any part thereof. And the Court [CHASE, Ch. J., DONE and SPRIGG, JJ.] sustained the objection. The plaintiff excepted.

2. The plaintiff, having given in evidence a copy of the inventory of certain goods and chattels of Sarah Emory, then produced two certain original papers in writing, as \* follows, to wit: A. **246** "Additional inventory to the inventory of Mrs. Sarah Emory's estate, offered by Ezekiel Forman, the administrator." [Here follow the articles.] B. "Except the bonds due to the estate, the crop of wheat and tobacco, and the money found in the estate, a particular account of which is lodged with the Court by the Administrator." And the plaintiff proved, by William H. Nicholson, Esquire, register of wills for Queen Anne's County, that when applied to for copies of original papers in the above cause in April, 1804, he found the original papers carefully wrapped up in the original inventory of the estate of Sarah Emory, and filed in a bundle of other papers belonging to his office, and he has no recollection of having seen this paper before; but he finds that he gave a certificate of the paper on the 21st of October, 1799, for the plaintiff, but has no recollection of the situation in which the paper was in 1799; but from the manner in which papers are usually filed away in his office, he believes that in the year 1799, the paper was wrapped up in the same situation that he found it in April, 1804; that he was appointed register of wills in the year 1796, and he has no knowledge of the time or by whom the above paper was brought into the register's office, but believes, and is firmly convinced, that it was lodged in the office before he was appointed register. The plaintiff further proved, by competent evidence, that the writing on the paper marked A, was the hand-writing of one Donald M'Quinn, who acted for several years as the clerk of Ezekiel Forman; but the witness, by whom the hand-writing of Donald M'Quinn was proved, declared that he had no knowledge at what time and at whose instance the paper was made out, nor has he any knowledge of its being lodged in the register's office for Queen Anne's County, and that the words "additional inventory," endorsed thereon were the hand-writing of Ezekiel Forman; and also that the writing on the paper marked B. was the hand-writing of said Forman. The plaintiff then offered the original papers, so proved, as evidence to charge Ezekiel Forman, in his capacity of administrator of Sarah Emory, with the several sums of



money specified in the paper marked A, as part of the chattels, rights and credits, of Sarah Emory. But the defendant objected to said papers, and contended that the same were not competent evidence. And the Court, [CHASE, Ch. J. DONE, and \* SPRIGG, JJ.] were of opinion, that they were not competent evidence **247** in law to charge Ezekiel Forman, as aforesaid, and refused to permit them to be given in evidence to the jury. The plaintiff excepted. Verdict and judgment for the defendant.

*Wright, Hammond, and John Scott, for the plaintiff.*

*Martin, (Attorney-General), Carmichael, and James Scott, for the defendant.*

The plaintiff appealed to this Court.

THE COURT concurred with the General Court in the opinion expressed in the first bill of exceptions, but dissented from that expressed in the second.

*Judgment reversed, and procedendo awarded.*

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CHAPLIN vs. CRUIKSHANKS.

In an action of slander for words spoken, it was alleged that the defendant had charged the plaintiff with poisoning his, the defendant's horse—*Held*, that the words were not actionable.

The Court refused to direct the jury, that if the horse was alive, the words laid in the declaration were not actionable, the same being irrelevant to the issue.

The Court also refused to direct the jury, that if the words spoken did not amount to an offence for which the plaintiff might be indicted, they were not actionable, as the defendant might take advantage of it in arrest of judgment. (a)

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(a) In *Dorsey vs. Whipps*, 8 Gill, 461, the Court said that since the cases of *Chaplin vs. Cruikshanks* and *Sheely vs. Biggs*, 2 H. & J. 247, 363, "it must be considered to be law that if the words stated in the declaration are not actionable, objections to the insufficiency of the declaration may be taken advantage of by motion in arrest of judgment. Indeed in the case first cited, the Court went further, and refused to give an instruction simply because, if such was the law, the defendant might take advantage of it in arrest of judgment. The reason of this was, that if the defendant would not demur because of the supposed defect in the declaration, he should not, especially if he justified, obtain a verdict simply because of this defect, and thus place upon record what seemed to be proof that the matter pleaded in justification had been proved to the satisfaction of the jury. Although a different practice has prevailed of late years in our Courts, yet its propriety is not quite clear, and would not seem to justify a reversal of the Court's decision in that case." But in *Wagman vs. Byers*, 17 Md. 184, it was held that the right of the defendant to obtain an instruction from the Court to the jury that the words spoken, as charged in the declaration, are not *per se* sufficient to maintain the action, is well established.

**APPEAL** from Kent County Court. The plaintiff in the Court below, (now appellee,) an infant 19 years of age, by his next friend, brought an action of slander against the defendant, (the appellant). The first set of words charged in the declaration, with the usual innuendoes, were—"my horse is poisoned, and will die, and Robert Cruikshanks had done it, and that he had furnished a certain negro Charles with oil of vitriol, which the said negro Charles had rubbed upon him, and that he also believed that the same was pre-meditated." The second set of words, as charged, were the same words, adding, "and that he believed that he was capable of such things, and that he would make no secret of it, but would tell it everybody." Plea not guilty, and issue joined.

1. The defendant, at the trial, moved the Court to direct the jury, that if they should be of opinion, that the horse, which the defendant is alleged to have charged the plaintiff with poisoning, was still living, that then the words laid in the declaration are not actionable, and of course their verdict must be for the defendant. But the Court, [TILGHMAN, Ch. J.] was of opinion, that the above was irrelevant to the issue, and therefore refused to give any direction thereon to the jury. The defendant excepted.

**248** \* 2. The plaintiff having brought this action of slander against the defendant, in which he alleged that the plaintiff had poisoned his horse, and there being no averment in the declaration that the horse was dead, the defendant moved the Court to direct the jury, that if they should be of opinion, that the words charged in the declaration to have been spoken by the defendant, were really so spoken, yet as it did not amount to an offence for which the plaintiff might be indicted, the words were not actionable, and of course their verdict must be for the defendant. But the Court, [TILGHMAN, Ch. J.] declined giving the direction to the jury on the subject, as the defendant might take advantage of it in arrest of judgment, and accordingly refused to do so. The defendant excepted. Verdict for the plaintiff, and damages assessed to £25 current money. Motion by the defendant in arrest of judgment "for that the declaration of the plaintiff is insufficient, there being no cause therein stated, on which the said action can be maintained." The County Court overruled the motion, and rendered judgment on the verdict for the plaintiff.

*Carmichael and Frisby*, for the plaintiff, and

*Wright and Houston*, for the defendant.

The defendant appealed to this Court.

**THE COURT** concurred in the opinions given by the Court below in both of the bills of exceptions; but reversed the judgment, because the words laid in the declaration were not actionable.

*Judgment reversed.*

MARTIN and SMITH *vs.* GUNBY *et al.* Lessee.

In an action of ejectment brought by the lessee of the Vestry of a Parish, the plaintiff, in order to prove title to the lands in question, offered to read in evidence certain entries in a book, purporting to be, and proved by a witness, who was formerly register of the vestry to be handed down to him as the vestry book of the parish—*Held*, that the testimony was inadmissible.

APPEAL from Worcester County Court. The appellee, (the plaintiff in the Court below,) brought an action of ejectment on a demise from The Vestry of All-Hallows Parish, to wit, John Gunby, &c. &c. of a tract of land called Snow Hill, it being part of lot No. 9 in the town of Snow Hill, in the County of Worcester. The defendants below pleaded not guilty, and took general defence. At the trial, the plaintiff offered to read in evidence certain entries in a book purporting to be, and proved by Robert Handy, who was formerly rector of the vestry, to be handed \* down to him as the vestry book of the parish of All-Hallows, viz.: "The proceedings of a vestry held at Snow Hill, to wit, the 4th March, 1694-5. This vestry hath appointed that the church shall be built at Snow Hill, upon the lot formerly laid out for that use, and by reason that the distance of 50 or 60 miles may not answer all person's conveniency to attend from the remote inhabitants, therefore it is agreed by this vestry to have a chappell of ease, the better to answer the more northern inhabitants of the sea side. It is further agreed by this vestry to build a church at Snow Hill of 40 feet long," &c. "May the 5th, 1741. Capt. James Martin moves to the vestry of this parish, for the liberty of building a small house on the lower end of the church lot, near the river side, to set up a pair of scales in; and the said Martin has liberty to remove the said house and scales off the lot aforesaid, when he shall think so fit." The defendant objected to the evidence as incompetent. But the Court, [POLK, Ch. J.] overruled the objection, being of opinion that the testimony was legal, and admissible. The defendants excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this Court. **249**

The cause was argued at June Term, 1807, before CHASE, Ch. J. TILGHMAN, NICHOLSON, and GANTT, JJ. by

*J. Bayly and Whittington*, for the appellant, and by

*W. B. Martin, Dennis and Wilson*, for the appellee.

*Judgment reversed, and procedendo awarded.*

HOWARD vs. MOALE *et al.* Lessee.

The death of one of the lessors of the plaintiff, in an action of ejectment, may be suggested after the jury are sworn, and his heir, &c. need not appear, or be made a party. (a)

On the question, whether or not a grant of land from the Proprietary to "R. M. and the heirs of his body lawfully begotten forever," created an estate tail in R. M. and upon his death without issue, the reversion was in this State standing in the place of the Proprietary, notwithstanding R. M.'s deed barring the estate tail. *Held*, that no interest in the nature of a trust estate ever was vested either in the Proprietary, or in the State in the place of the Proprietary, no act having been done which could create a trust in either; and that they could only be considered as parties having a reversionary interest expectant on the determination of the estate tail.

The *jura regalia*, as attached to the person of the King of England, never did attach to the Lord Proprietary of Maryland. (b)

The Proprietary held the dominion of Maryland, and property of the soil, which he could sell and dispose of in the same manner, as any other person, and subject to the same beneficiary, legal and equitable rights, as in the hands of any other person.

On an equitable interest being obtained in land agreeably to the rules of the land office, the party became entitled to a grant which he could compel of the Proprietary.

The reversionary interest of the Proprietary reserved in lands granted by him, might be destroyed by deed made by the tenant in tail, under the Act of June, 1773, ch. 1, as effectually as the reversionary right of any individual.

The State held the Proprietary's reversionary interest merely by substitution in his place, and a deed since the Act of November, 1782, ch. 23, was competent to bar and extinguish the reversionary interest of the State. (c)

A grant for escheat land will relate back to the original grant. (d)

A subsequent grant, covering land in which the Proprietary had a reversionary interest, will operate to pass such reversionary interest:

A grant of land surveyed under a common warrant, will not pass land not then liable to escheat, but which afterwards became escheat, and as such granted to a third person. (*Note.*) (e)

An escheat certificate and grant do, by operation of law, relate to the original tract, and is strictly within the principal and rule of law of relation between grants and certificates.

Where the first and second courses of an original grant of a tract of land called D. F. are described as "beginning at a bounded locust tree, being

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(a) See Rev. Code, Art. 64, sec. 32.

(b) See *Kelly vs. Greenfield*, 2 H. & McH. 78.

(c) Approved in *Smith vs. Devecmon*, 30 Md. 479.

(d) Affirmed in *Casey vs. Inloes*, 1 Gill, 507, 508. See *Owings vs. Norwood*, ante, 103; *Hall vs. Gittings*, ante, 112; *Smith vs. Devecmon*, 30 Md. 483; *Garretson vs. Cole*, 2 H. & McH. 305, note.

(e) Approved in *Casey vs. Inloes*, 1 Gill, 509. Cf. *Hall vs. Gittings*, ante, 112; *Armstrong vs. Bittinger*, 47 Md. 108.

the N. E. bounded tree of D. P's land, [called U. C.] and running by the land of the said P. E. 65 ps. to a bounded oak, then N. E. 150 ps. to a bounded red oak of the said P's land; and the first and second courses of an escheat grant of the same land called D. F. is described as "beginning at a locust now bounded at or very near to the place where stood a bounded locust, the original beginning tree of D. F. and a bounded tree of a tract of land called U. C. formerly laid out for D. P. and running thence with the said land E. 65 ps. (it being expressed in the certificate of the original survey to run by the land of the said P. E. 65 ps. to a bounded oak, which cannot be found,) thence N. E. 238 ps. still bounding on the said land, to the N. W. branch of Patapsco River, (it being therein expressed to run N. E. 150 ps. to a bounded red oak of the said P's land, and the certificate of the said P's land mentioning to run that course to a bounded red oak standing by the side of the said N. W. branch, which oak is not known,") Held, that there was no doubt or ambiguity, and that if the beginning of D. F. is rightly located on the plots at the termination of the twelfth line of U. C. and there is no evidence of the existence of any tree as called for at the termination of the first line of D. F. then the expressions in the escheat grant do bind that grant to the true location of the original tract called D. F. as to the two first lines thereof, so far as the second line of the original did actually extend; and that the first and second lines of the original tract do, by virtue of the expressions therein used, bind those lines on the thirteenth and fourteenth lines of U. C. (a)

Where the plaintiff has not located his escheat grant on the plots in the cause co-extensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant; but he is estopped by that location from going beyond the letter V, located on the plots, from whence he must run to the head of Howard's Branch, at whatsoever point the same may be agreeably to his location of his pretensions, and the location by which the defendant has taken defence.

The plaintiff cannot give any evidence of the lines of his escheat grant, running otherwise than he has located them on the plots in the cause as his pretensions; but he is not precluded from giving evidence of any other lines, as the lines of the original tract, by way of illustration: and he may support the location of his pretensions, so far as he can show that they are located within the limits of the original tract. (b)

From the place where the second line of a tract of land terminated, the third line thereof, viz. "Then N. N. W. 86 ps. to a bounded red oak, then," &c. must run the number of perches expressed in the grant, and cannot in its length be increased or diminished, unless proof is made of the tree called for, or the place where it stood.

(a) Examined in *Pennington vs. Bordley*, 4 H. & J. 467, where it is said that this decision amounts to nothing more than this, that where a junior survey calls to a tree as the beginning of another tract, and then to run with it to the 2nd and 3rd boundaries of the original tract, such junior survey must run to, and be governed by, the lines of the original tract, if the bounds thereof are known, as they are also the bounds of the junior survey; but if they are not known, the junior survey must then be governed by the legal location of the elder tract, as the same can be ascertained at the trial.

(b) The plots and certificates of survey may be amended at bar. Rev. Code, Art. 64, sec. 25. See *Hughes vs. Howard*, 3 H. & J. 9; *Clary vs. Kimmel*, 18 Md. 254; *Newman vs. Young*, 30 Md. 417; 2 *Poe's Pldg.* sec. 477.

So the fourth line, viz. "Then S. W. to the head of Howard's Branch, then," &c. must run a straight line to the head of Howard's Branch.

A private plot of the lands in dispute, permitted, under certain circumstances, to be read in evidence.

The course and distance expressed in a grant of land, must always be controlled by a call expressed therein as the termination of the course; and the following course and distance used in the grant, viz. "N. E. 50 ps. to a small branch which maketh the outward narrows of the said land," must be complied with, as nearly as they can, to strike the branch described, as it existed at the time of the survey, subject to the variation of the compass on that line.

The Court refused to direct the jury, that the second line of a tract of land, viz. "Then N. E. 150 ps. to a bounded red oak of the said P's land," (being the fourteenth line of that land, which tree being lost, the place where it stood could not be proved,) must terminate at the end of 150 ps. from the beginning thereof, it being a matter of fact to be left to the determination of the jury. (a)

The Court refused to direct the jury, that an escheat grant did not pass any land included in the original grant, except the same was included within the metes and bounds of the escheat grant, as particularly described; and that the escheat grant did not, by legal operation, convey all the land included within the original grant, unless the particular metes and bounds of the escheat grant did also include the same. (b)

A deposition taken on the survey of a witness, who was absent out of the State at the time of the trial, was permitted to be read in evidence, due diligence having been used to obtain the attendance of the witness. (c)

The Court directed the jury, that they might find the true location of D. F. for which the ejectment was brought, by a greater or less variation of the compass, as might appear to them proper from the evidence; provided that by such allowance of variation they did not enlarge or extend the plaintiff's pretensions beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V, to the head of Howard's Branch.

The Court directed the jury, that the plaintiff could not recover any land which should be found to lie without and beyond a straight line to be drawn from the letter V. to the head of Howard's Branch, (he having located that line of his grant in that manner,) although those lands should lie within the lines of the tract of land for which the ejectment is brought, and also within the lines of the plaintiff's pretensions, as located on the plots.

The Court refused to direct the jury, that if the plaintiff is estopped from showing the true location of the land, for which the ejectment is brought different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff.

The jury, by their verdict, in an action of ejectment, having found the true location of the land, for which the ejectment was brought, to be from A to a, to 3, to four perches below big F, the head of Howard's Branch, and then to A; they also found for the plaintiff his pretensions, (not

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(a) But see *Carroll vs. Norwood*, 5 H. & J. 155.

(b) See Note (d,) ante, p. 218.

(c) See *Rogers vs. Raborg*, 2 G. & J. 54.

being to the extent of the said location,) to be from *A* to *a*, to *V*, to four perches below big *F*, the head of Howard's Branch, and then to *A*, and that the defendant was guilty of the trespass complained of within the said pretensions, and not guilty as to the residue of the trespass complained of in the residue of the land. *Held*, that there was no uncertainty in the verdict.

A mortgage of lands to a British subject before the Revolution, was not thereafter defeated by the Act of Confiscation, but it was protected by the British treaty, and the mortgage property was decreed to be sold to pay the mortgage debt. (*Notes*.)

APPEAL from the General Court. The appellee, on the 5th of May, 1801, instituted his action of ejectment for a tract of land called David's Fancy, situate in Baltimore County, into forty-eight separate parts, to be divided, nine parts of which were demised by John Moale, nine parts by \* Richard H. Moale, nine parts by Robert North Moale, nine parts by Samuel Moale, nine parts by Randle Hulse Moale, one part by Thomas Moale, one part by Richard Carson, Junior, and one other part by Rebecca Russell. The defendant, (now appellant,) pleaded not guilty, and took defence on the plots made and returned in the cause. **251**

The plaintiff, at the trial Court, in May, 1804, made his claim and pretensions for a tract of land called David's Fancy, resurveyed for John Moale, on the 1st day of November, 1738, as the same is located by him, the plaintiff, upon the plots returned in the cause, as per table of courses No. 2, viz. From the letter *A*, (1) N. 86½, E. 65 perches, (2) N. 41½, E. 235 perches to *b*, (3) N. 25½, W. 86 perches to *V*, (4) N. 86, W. 112½ perches to *F*, (5) S. 51, W. 14, (6) S. 24, W. 5, (7) S. 67, W. 12, (8) S. 10½, W. 40, (9) S. 70, W. 4, (10) S. 47, W. 6, (11) S. 36½, W. 16, (12) S. 54, W. 21, (13) S. 75, W. 8, (14) S. 18½, W. 14, (15) S. 71, W. 14, (16) S. 35, W. 14, (17) S. 89, W. 10, (18) S. 28, W. 14, (19) S. 8, W. 18, (20) S. 10½, E. 18, (21) S. 65, E. 18, (22) S. 14½ E. 38, (23) S. 40½, E. 23, (24) S. 7, W. 31, (25) thence to the beginning, containing 257 acres. The defendant took defence for all that part of Lun's Lot, granted to Edward Lun on the 20th of July, 1673, beginning at red *A* on the plots, and running with the black drawn lines, red figures 1, 2, 3, 4, 5, 7, 8, 9, then with the blue shaded line to *P*, then with the black drawn line to 4, then with the red broken dotted line to *V*, then to red 1, then with the black lines, black figures 19, 20, red figures 14, 15, 16, 17, 18, 19, and then to red *A*, as per table of courses No. 26. Judgment was entered against the casual ejector for the land called David's Fancy, undefended on the plots by the defendant. After the jury were sworn by the issue, the plaintiff, by his attorneys, suggested, that since the demises in the declaration, and the institution of this suit, and before then, &c. to wit, on, &c. Richard H. Moale, one of the lessors in the declaration \* mentioned, who demised nine parts of the premises, (in forty-eight parts to be divided,) to the plaintiff, had died, and **252** which was not denied.

1. The first bill of exceptions.—The plaintiff, to make title to the tract called David's Fancy, read in evidence a certificate of survey of David's Fancy made for David Williams on the 22d of June, 1671, and containing 100 acres, which certificate recites, that by virtue of a warrant granted unto Robert Wilson for 650 acres, bearing date the 17th of June, 1671, 100 acres thereof was assigned unto David Williams, by Wilson, there was, therefore, laid out for Williams "a parcel of land called David's Fancy, lying in Baltimore County, on the N. side of Patapsco River, and on a branch called the Middle Branch, beginning at a bounded locust tree, being the N. E. bounded tree of David Poole's land (a), and running by the land of the said Poole E. 65 perches, to a bounded oak, then N. E. 150 perches to a bounded red oak of the said Poole's land, then N. N. W. 86 perches to a bounded red oak, then S. W. to the head of Howard's Branch, then bounding on the said branch, and the said Middle Branch, to the first bounded tree, containing and laid out for 100 acres more or less." The plaintiff also offered in evidence a patent for the land called David's Fancy, granted to Williams on the 1st of May, 1672. The courses, &c. in the patent corresponding with those in the certificate, except in the patent the S. W. course, last above mentioned, is described to run "S. W. and by W. to the head of Howard's Branch," &c. He also offered evidence, that Williams departed this life, intestate, and without heirs. He also produced and read to the jury, a warrant of escheat issued to John Moale, setting forth that there was escheat to the Lord Proprietary, a tract of land called David's Fancy, lying in Baltimore County, on the W. side of the Middle Branch, originally granted on the 1st of May, 1672, to David Williams, for 100 acres. That on the 13th of March, 1722, a certain Thomas Cromwell, by his petition, setting forth that he was seized in fee thereof, obtained a special warrant to resurvey it, and a certificate thereof was returned, by which it appeared that there were 83 acres of surplus land included, for which Cromwell never compounded nor sued out grant of confirmation thereon, contrary to sundry \* of his Lordship's proclamations for that purpose published. That apprehending his Lordship's right had not been complied with, Moale, on the 14th of April, 1737, obtained a special warrant to resurvey the said tract, in order to have the benefit of the surplus, and the contiguous vacancy, if any. That since, upon the strict search made both in the record of the Provincial Court and County Court of the county where the land lay, as also in the records of the commissary's office, he could not find any conveyance from Williams to one John Athrine, who had pretended a right to the land, nor to any other person, nor that ever he willed the same to any person whatsoever; by which means, Moale was advised that the land had become escheat to his Lord-

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(a) Called "Upton Court."



ship; and he, being the first discoverer, and desirous to purchase his Lordship's right thereof, be it escheat by the means aforesaid, or by any other ways or means whatsoever, prayed a special warrant to resurvey the same, &c. which was granted, &c. and the surveyor was directed carefully to resurvey, for and in the name of Moale, the tract of escheat land called David's Fancy, according to its ancient metes and bounds with its surplusage, and by his outlines adding what vacant land he could find to the same contiguous, whether cultivated or otherwise, not running his lines, &c. He also offered evidence, that the warrant, not having been executed in time, was, on the 17th of May, 1738, renewed for six months longer. That in virtue of the last mentioned warrant, a certificate of survey was returned, dated the 1st of November, 1738, by which it appears, that there was resurveyed for in the name of Moale, the tract of land called David's Fancy, with its surplusage, according to the ancient metes and bounds thereof, as shown to the surveyor, lying in the county aforesaid, on the E. side of the middle branch of Patapsco River, beginning at a locust now bounded at or very near to the place where stood a bounded locust, the original beginning tree of David's Fancy, and a bounded tree of a tract of land called Upton Court, formerly laid out for David Poole, and running thence, with the said land, E. 56 perches, (it being expressed in the certificate of the original survey to run by the land of the said Poole, E. 65 perches to a bounded oak, which cannot be found,) thence N. E. 238 perches, still bounding on the said land to the N. W. branch of Patapsco River, it being therein expressed, \* to run N. E. 150 perches to a bounded red oak of the said Poole's land, and **254** the certificate of the said Poole's land mentioning to run that course to a bounded red oak, standing by the side of the said N. W. branch, which oak is not known, thence N. N. W. 86 perches, S. 83° 30' W. 133 perches, to the head of Howard's Branch, it being expressed to run S. W. to the head of Howard's Branch, thence bounding on the said branch, and the aforesaid Middle Branch, to the first bounded tree, as mentioned in the certificate of the original survey, as follows, viz. S. by W. 16 ps. S. 41, E. 16 ps. N. 83, W. 24 ps. S. W. 40 ps. N. 73, W. 10 ps. S. 22, W. 24 ps. W. 9 ps. S. 30, W. 12 ps. N. 74, W. 10 ps. still bounding on Howard's Branch to the Middle Branch, thence S. 38, W. 16 ps. S. 11, W. 15 ps. S. 2, E. 12 ps. S. 12, E. 12 ps. S. 70, E. 12 ps. S. 12, E. 38 ps. S. 37, E. 28 ps. still bounding on the Middle Branch, and thence by a straight line, bounding on the branch, to the beginning, containing and laid out for 257 acres more or less, to be held," &c. "by the name of David's Fancy." He also read in evidence the grant issued thereon to Richard Moale, dated the 29th of September, 1750, which grant recites, that Charles Croxall, (guardian and next friend to Richard Moale, an infant, under the age of twenty-one years,) did set forth, that a certain John Moale, deceased, father to Richard, did heretofore set forth that there was

escheat, &c. (as in the recital in the special warrant granted to John Moale,) that a warrant issued, was renewed, and a resurvey made, and certificate thereof returned, by which it appeared, &c. That before John Moale obtained a grant of confirmation for the same, he died, but before his death he made his last will and testament, in which was the following bequest: "Item. I give and bequeath unto my infant son, to be christened by the name of Richard, all that tract of land I bought of Jacob Giles, named Upton Court, and also the land adjoining thereto, which I escheated and paid his Lordship's agent for, as per the receipt on the back of the certificate now in the office, the patent not yet being issued out, to him my said beloved infant son, and his heirs lawfully begotten, from him and their bodies, for evermore; but if either of my aforesaid sons should die without such heirs aforesaid, then it is my will, that the land which I have herein devised the dead son, heir less, shall go to the living son, to be held of him, and his lawful heirs, from \* generation to generation as aforesaid." Croxall, therefore, prayed,

**255** that forasmuch as the right of the escheat land was in Richard Moale, and all requisites complied with, grant of confirmation might issue to him on the certificate, agreeably to the bequest aforesaid, &c. Therefore in consideration thereof, and other the premises, &c. the "Lord Proprietary did give, grant and confirm, unto him, the said Richard Moale, and the heirs of his body lawfully begotten, for ever, agreeably to the bequest aforesaid, all that the aforesaid tract or parcel of escheat land resurveyed, and still called David's Fancy lying," &c. as described in the certificate herein before mentioned—"To have and hold the same unto him the said Richard Moale, and the heirs of his body lawfully begotten, for ever; to be holden, of," &c. He also read in evidence the last will and testament of John Moale, for whom the certificate of survey was made and returned, dated the 14th of January, 1739-40. Whereby he devised to his son John, to him and his heirs lawfully begotten from him and their bodies, for ever more, sundry parcels of land; and he also devised to his infant son, to be christened by the name of Richard, the lands mentioned in, and in the manner set forth in the grant last before mentioned. He also read in evidence a deed of indenture dated the 11th of April, 1783, from Richard Moale to James Croxall, reciting that Moale was seized of an estate, in fee tail, in and of a tract of land called David's Fancy, (saving and excepting that part thereof before conveyed by him to Mary Tribolet,) lying, &c. and it was the intent, meaning and design of Moale, according to the Act of Assembly, &c. fully and effectually to bar, dock and destroy the entail, and to grant, convey and transfer to Croxall, and his heirs, absolutely and fully, the said tract of land, (saving and excepting as aforesaid,) with the appurtenances thereunto belonging, in order, and with the intent, and for the purpose, that Croxall, on his becoming thereby seized thereof in fee simple, might reconvey and assure unto Moale

and his heirs, the tract of land, &c. in consequence and on the operation whereof, Moale might be and stand seized of, and be entitled unto, the premises, fully and absolutely, in fee simple. The indenture, therefore, witnessed, that Moale, in consideration of the premises, and also for and in consideration of the sum of five shillings, &c. granted, &c. unto Croxall, the tract of land, (saving \* and excepting as aforesaid,) in the usual form. He also read in **256** evidence a deed of indenture, dated the 12th of April, 1783, from James Croxall to Richard Moale, for the tract called David's Fancy, excepting that part sold by Moale to Mary Tribolet. (a) He also offered in evidence, that Richard Moale died sometime in the year, 1786, without issue of his body lawfully begotten, having first duly made and executed his last will and testament in writing, dated the 22d of February, 1786, whereby he devised all that part of the tract of land called David's Fancy, for which this suit is brought, to his brother John Moale, in fee simple. That John Moale, the devisor first named, left, at the time of his death, two sons, to wit, John Moale, his eldest son and heir at law, and Richard Moale, the patentee before named. That John Moale, the devisee last named, died in the year 1797, having first duly made his last will and testament, dated the 20th of July, 1797, whereby he devised all that part of David's Fancy, for which this suit is brought, to his sons John Moale, Richard Moale, Robert North Moale, Samuel Moale, George Washington Moale, and Randle Hulse Moale, their heirs and assigns to be equally divided between them, share and share alike, as tenants in common. He also gave in evidence, that George Washington Moale, the devisee mentioned in the last mentioned will of John Moale, the younger, died after his father John Moale, in the year 1797, intestate, unmarried, and without a child. That the lessors of the plaintiff, to wit, John Moale, Richard H. Moale, Robert North Moale, Samuel Moale, Randle Hulse Moale, Thomas Moale, Rebecca Russel, and Elizabeth, wife to Richard Curson, in the declaration mentioned, are the children and the only children, of John Moale, the last named devisor; that Richard Moale, one of the lessors of the plaintiff, died since the bringing of this suit, and during the pendency thereof, leaving issue now in full life. He also offered evidence, that the true location of the land called David's Fancy, granted to David Williams in 1672, is, as he hath located the same upon the plots returned in this \* cause; and also that the true location of the land called **257** David's Fancy, granted to Richard Moale in 1750, for the recovery of which this suit is brought, is the same as that of David's Fancy, the original granted to David Williams in 1672, as located by

(a) The defendant's attorneys, at this stage of the trial, made their objections to the grant to Richard Moale; but as the bill of exceptions contained the whole evidence of title adduced by the parties, we have adopted the mode pursued in the bill of exceptions.

the plaintiff on the said plots. The defendant then read in evidence the certificate of survey, dated the 10th of October, 1672, and grant of Lun's Lott, to Edward Lun, bearing date on the 20th of July, 1673, whereby it appears that there was surveyed "a parcel of land lying in Baltimore County, on the N. side of Patapasco River, and on a branch called the N. W. Branch, called Lun's Lott, beginning at a bounded hickory standing on the W. side of the falls of the N. W. branch, and in the line of the land of Thomas Perte and Robert Ben-jor, called Sallisbury Plaine, and running with the line of the said land N. W. and by N. 38 ps. to a bounded hickory in the line of the said land, then S. W. 165 ps. to a bounded red oak, then S. 40 ps. then W. N. W. 45 ps. to a bounded hickory by the head of a branch, then S. 125 ps. to a bounded red oak, then W. and by S. 20 ps. then S. and by E. 40 ps. then S. E. 80 ps. to a bounded Spanish oak, then S. 60 ps. to a bounded white oak in the land of John Howard, called Timber Neck, then by the said land E. S. E. 74 ps. to a bounded white oak of the said Howard's land, then S. E. 120 ps. to a bounded red oak standing in a bite of the N. W. branch, then bounded on the said branch lying up N. 50 ps. to a bounded red oak, then N. N. W. 38 ps. then W. N. W. 100 ps. then N. and by W. 50 ps. to a locust marked with four notches, then N. N. E. 45 ps. to a bounding red oak in the line of the land of Thomas Cole, then W. 75 ps. to bounded oak of the said Cole's land, then by the said land N. N. E. 275 ps. to another bounded oak, then E. 65 ps. to the falls, then bounding on the said falls to the first bounded tree, containing 200 acres, more or less," &c. He also read in evidence the certificate of survey, dated the 8th of April, 1762, and grant of Lun's Lott Enlarged, dated the 25th of March, 1763, surveyed for and granted to Cornelius Howard, and Ruth his wife, and containing 414 acres, more or less, being in virtue of a special warrant to resurvey a tract of land called Lun's Lott; and also proved, that Lun's Lott and Lun's Lott Enlarged, are truly located on the plots returned in this cause. He also offered

**258** evidence to prove, that he is heir at law to Edward \* Lun, the patentee of Lun's Lott, and also the heir at law of Cornelius Howard, and Ruth his wife, the patentees of Lun's Lott Enlarged. The defendant then prayed the opinion of the Court, and their direction to the jury, that the plaintiff, upon the above statement of facts, hath not made title to the lands for which the defendant hath taken defence in this cause, nor any part thereof. and cannot recover in this action.

*Ridgely*, for the defendant, contended that the grant to Richard Moale of the 29th of September, 1750, for David's Fancy, vested in him an estate tail, and that upon his death, without issue, the reversion is in the State of Maryland, standing in the place of the Proprietary; and that the deed from Moale to Croxall had not the effect to bar the estate tail. He cited the Act of Assembly of Nov. 1782,

ch. 23; *Pigott*, 85, 87, 88, 89; *Neal vs. Wilding*, 1 *Wilding*, 149; *Anon. Noy*, 132; 18 *Vin. Abr. tit. 33*, pl. 9; 5 *Bac. Abr. tit. Prerogative*, (E. 5.)

*Shaafl*, on the same side, cited the Act of Assembly 1780, ch. 45; *Owings vs. Norwood's Lessee* (*ante Stewart and Patten*, (a); *Laus \* vs. The Attorney-General Kelly vs. Greenfield*, 2 *H. & McH.* 121; *Russell vs. Ba & J.* 71; *Gittings vs. Hall*, *ante* 112; 5 *Bac. Abr. tit. 3*;) *Com. Dig. tit. Estates*, (B. 31;) *Statutes* 34 *Hen. VI* of Assembly of November, 1787, ch. 9, and 1785, ch. 8; *Stump et al.* 2 *H & McH.* 174; *Laidler vs. Young's Lessee Martin* (Attorney-General,) *Key and W. Dorsey*, fo cited *Calvert vs. Eden et al.* 2 *H. & McH.* 279; *Ac* of Nov. 1782, ch. 23; *Doe vs. Pegge*, 1 *T. R.* 758, (*ne* vs. *Peirse et al.* 3 *Burr.* 1900; *Goodtitle vs. Jones*, 7 *T. hurst, J.*; *Doe vs. Wharton & Dixon*, 8 *T. R.* 2; *Gibb. on* 83, 85, 86; 5 *Bac. Abr. tit. Prerogative, E. 3*; *Owing*, *ante* 96.

*Harper*, in reply, cited *Hall vs. Gittings*, June, 1809; *Hall vs. Gittings*, June, 1809; *Russell vs. Baker*; *Gittings, Jun. vs. Hall*, and *C wood*.

(a) In the case of *Stewart vs. Allen and Patten*, in the Court at May Term, 1799, the bill was filed on the 29th of August, 1799, was admitted, that the land mentioned in the bill was mortgaged by Patten on the 20th of May, 1771, to secure the payment of £1000 sterling money, with interest thereon on the 20th of May, 1778. It was also stated that Allen was a subject of the King of Great Britain, resided in England in 1775, and went to England in that year, and had resided there since. It was submitted to the Chancellor to determine, first, whether the mortgagee was entitled to recover interest on the mortgage debt.

HANSON, Chancellor. It appears, that under the circumstances of this case, the Chancellor is under no necessity of deciding, or settling, in the General Court, the question, as the complainant is a British subject, whether or not the interest of the complainant in the mortgaged land mentioned in the bill, was defeated by the Revolution in America, and the confiscation Act of this State; and that the complainant is entitled to recover the debt paid by the defendant, or discharged from a sale of the property. *Decreed*, that unless the mortgaged debt, with interest thereon, be paid on the 4th of July, 1776, to the 3d of September, 1783, until the debt be paid on the 9th of November next, the property in the bill must be sold, &c.

*Kilty* and *Shaafl*, for the complainant.

*Moale*, for the defendants.

(b) The case of *Lawson vs. The Attorney-General*, in the Court at May Term, 1800, was similar to that of *Allen vs. Stewart and Patten*. In that case, Semple mortgaged lands to Lawson, a British subject, and the mortgage was made to secure the payment of a debt, it was protected by the Act of Assembly. The Attorney-General was made a party, who admitted the mortgage to be in the State, and the land was decreed to be sold for the payment of the mortgaged debt.

DONE, J. delivered the opinion of the Court. (a) The Court are of opinion, that no interest of the nature of a trust estate ever was vested either in the Proprietary of Maryland, or in the State of Maryland in place of the Proprietary. There does not appear ever to have been any act done which could create a trust in either; and that the Proprietary and the State could only be considered as parties having a reversionary interest expectant on the determination of an estate tail.

The *jura regalia*, as attached to the person of the King in England, never did attach to the Lord Proprietary of Maryland.

**260** \* The Lord Proprietary held the dominion and property of the soil, which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary legal and equitable rights, as in the hands of any other person; and on an equitable interest being obtained, agreeably to the rules of his land office, by any person taking out a warrant, returning a certificate of survey, and paying the composition money, the party became entitled to a grant which he could compel from the Proprietary.

In the present case, suppose the right of the Proprietary to have continued in full force until the year 1783, his reversionary interest in the lands in question would have been destroyed by the deed made by Richard Moale, the grantee in tail, under the operation of the Act of 1782, as effectually as the reversionary right of any citizen of Maryland.

The question then occurs, whether the case is materially altered by the Proprietary's rights passing into the hands of the State.

On this view of the subject, a doubt might arise, whether the State, being vested with the sovereignty as a body politic, can be affected by any laws in which she is not specially named. But this difficulty, in the opinion of the Court, is removed, when we consider the State as standing, in the place of the Proprietary, in which view, and no other, we think the State can be considered in this case, as having no beneficiary interest in the lands in question, but holding the Proprietary's reversionary interest merely by substitution in his place, and for the use and benefit of those who had the right in virtue of the escheat and purchase from the Proprietary.

By the last will of John Moale, the elder, his interest in the lands passed agreeably to the disposition made by the said will, and the deed, made in 1783, by Richard Moale, the devisee, and the patentee of the land, was competent to bar and extinguish the reversionary interest of the State.

As these points have been elaborately and ingeniously argued by the learned counsel concerned, the Court have thought proper thus shortly to notice them, and express their ideas relative to them.

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(a) CHASE, Ch. J. did not sit, his sister being interested in the land in question.

But let us suppose that the opinion of the Court, so far, is not well founded, every objection to the plaintiff's title, arising from any particular prerogatives or privileges in the \* Proprietary or the State, which would protect their rights from being affected in 261 the same manner as those of citizens, is, in the opinion of the Court, completely removed by the operation of the grant of Lun's Lot Enlarged.

The escheat and grant of the Proprietary thereon will relate back to the original grant of David's Fancy, and there is no ground on which to presume that the escheat fell previously to the grant of Lun's Lot, the original, but on the contrary the presumption is strong that it did not occur until nearly about the time of the obtention of the escheat warrant.

By the grant of Lun's Lot Enlarged, all the reversionary interest of the Proprietary in David's Fancy, so far as Lun's Lot Enlarged interferes with and includes any part of David's Fancy, passes to a citizen, and of course is liable to be operated upon, and barred, in virtue of the Act of Assembly of 1782, by the deed from Moale to Croxall in 1783.

For these reasons the Court refuse to give the opinion and direction to the jury, which is prayed by the defendant's counsel. The defendant excepted. (a)

2. The second bill of exceptions.—The plaintiff then read in evidence a certificate of the survey of a tract of land called Upton Court, made for George Yate on the 12th of March, 1667, and a grant thereon issued to David Poole on the 2d of August, 1668, by which it appears that there was surveyed "a parcel of land called Upton Court, \* lying in Baltimore County, on the N. side of Patapsco River, opposite the land of Hugh Kinsey, beginning at a 262 bounded red oak standing on the southernmost side of a point of land

(a) D. Dulany, Esquire's opinion on the following case stated. A. was seized of a certain tract of land, under a title derived legally from the original grantee. B. obtained a common warrant of survey, and under this warrant, a survey was made, which included part of the land that had before been granted to A. and B. on the certificate returned by the surveyor, obtained a patent. Afterwards A. who was seized as aforesaid, died without heirs, and without having conveyed, or disposed of his title, in consequence whereof the land, of which A. died seized, became escheat. Afterwards C. obtained a warrant on the escheat, and as a part of the land, whereof A. died seized, was included in the survey of the grant to B. the query is, whether B. is entitled to the part so included, or C. who claims under the escheat? I am of opinion that B. is not entitled to any part of the land under the common warrant that he obtained, which he was not entitled to when he obtained thereon a patent, and as at the time when the patent was obtained by B. the title was in A. under a prior grant, I am of opinion that B. cannot legally claim any title to the part included in the patent to A.

August 13, 1783,

DANIEL DULANY.

formerly called Whetstone Point, and from the said oak bounding on the said river by a line drawn N. W. and by N. 40 perches, then N. W. and by W. 40 perches, and from the end of the N. W. and by W. line by a line drawn W. 100 perches, bounded on the W. by a line drawn W. N. W. 30 perches, then N. W. 100 perches, to a small creek, then over the said creek by a line drawn W. and by S. 30 perches, then W. S. W. 45 perches, then S. W. 80 perches to the mouth of another small creek, then over the said creek S. and by W. 45 perches, then S. W. and by S. 55 perches to a point which maketh the mouth of a branch called the Middle Branch, then bounding on the said branch by a line drawn N. W. and by N. 180 perches to a marked oak opposite a small island, and from the said oak N. E. 50 perches to a small branch which maketh the outward narrows of the said land, then E. 65 perches, bounded on the E. by a line drawn N. E. 150 perches to a bounded red oak standing by the N. W. branch, then E. S. E. 56 perches, then E. N. E. 120 perches, then E. S. E. 44 perches, then S. S. E. 100 perches to a small cove, then over the said cove by a line drawn S. E. 100 perches, to a point called The Sandy Point, then S. S. E. 48 perches to another marked oak on Whetstone Point, and from the said oak to the first bounded tree, containing 500 acres of land more or less." He also gave in evidence the plots and locations in this cause, and the admission of the plaintiff and defendant, that the eleventh line of Upton Court terminated at the letter black H. on the plots. He also gave in evidence, that the twelfth line of Upton Court terminated at the black letter A. on the plots; and further gave in evidence to the jury that the beginning of David's Fancy, the original, was at the letter A; and also that the beginning of David's Fancy, the escheat in 1738, was at the letter A. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if they find from the evidence in the cause that the twelfth line of Upton Court terminated at the letter A, and that the beginning of David's Fancy, the original, and David's Fancy, the escheat, was at the same place, that then the escheat certificate and patent \* of David's Fancy, granted to Richard Moale in 1750, do by operation of law relate to the original tract called David's Fancy, patented in 1672; and that the expressions in the escheat grant contained, do, by operation of law, bind the escheat land to run with the true location of the original tract of David's Fancy, as to the two first lines thereof, so far as the said lines extend; and that the first and second lines of the original David's Fancy, do by virtue of the expressions therein used, bind the said lines to run with the 13th and 14th lines of Upton Court.

*Shaaff* and *Harper*, for the defendant, referred to *Dorsey vs. Hammond*, 1 H. & J. 190; *Darnall vs. Goodwin*, 1 H. & J. 282; *Helm vs. Howard*, 2 H. & McH. 57; *Hammond vs. Norris*, ante 130; and *Kyger vs. Kirkpatrick*, 1 H. & J. 298.



DONE, J. delivered the opinion of the Court. Three propositions have been stated by the prayer of the plaintiff's counsel, for the opinion of the Court, and their direction to the jury.

1st. That the escheat certificate and patent of David's Fancy, granted to Richard Moale in 1750, do by operation of law relate to the original tract called David's Fancy.

2dly. That the expressions in the said escheat grant contained do, by operation of law, bind the said escheat land to the true location of the original tract called David's Fancy, as to the two first lines thereof; and

3dly. That the first and second lines of the original tract called David's Fancy do by virtue of the expressions therein used, bind the said lines on the 13th and 14th lines of Upton Court.

On the first point, the Court are of opinion that the escheat certificate and patent of David's Fancy do, by operation of law, relate to the original tract called David's Fancy. That this is a case strictly within the principle and rule of law, of relation between grants and certificates, which have been adopted and ratified by solemn decisions of the General Court and Court of Appeals, and that in law, reason or equity, there can be no distinction.

With respect to the second and third points proposed, it has been contended by the defendant's counsel, that the \* Court are precluded from acting upon them, by the decision of the **264** Court of Appeals in the case of *Dorsey's Lessee vs. Hammond*, and that by the rule laid down by that decision, these are to be considered as questions of location, and must be left to the determination of the jury.

This Court, let their private opinions be as they may, will always cautiously avoid interfering or clashing with the judicial decisions of the Superior Court, and will at all times pay respect to them as the established law of the land.

Whether too large a latitude is given to juries as to the construction of grants by the decision of the Court of Appeals in *Dorsey vs. Hammond*, and how far the rule and principle thereby adopted may operate to preclude uncertainty of decision, is not for us to consider.

The question then arises, whether the Court are precluded by that determination from giving their opinion on the question now before them? and we think that we are not so precluded; but that the present question rests on grounds and principles entirely distinct from that case, and *Helms vs. Howard*, which has been cited to the Court.

In *Dorsey's Lessee vs. Hammond*, the question was, whether the binding call in one course would be extended to the subsequent courses? the first using imperative binding expressions, which were dropped in those succeeding, then there were distinct courses, either of which might be pursued, and one of which must be rejected; and the Court of Appeals were of opinion, that this was a description

with a double aspect; that it was ambiguous and doubtful, and that therefore it was discretionary which set of courses should be pursued, and ought to be left to the jury as a question of location.

The opinion of the Judges in *Helm vs. Howard* is founded on the same principle. In that case all the expressions could not be gratified; there were two distinct and different courses, one of which must be pursued, and the other rejected. Therefore, the Court said, it must be left to the jury as a matter of location, to determine which must be adopted, and which rejected.

In the present case the Court are of opinion, that no such doubt or ambiguity appears. Abstractly considered, the expressions are unquestionably binding, and the Court of Appeals have so far concurred with this Court as to say, \* that we are competent to  
**265** determine where expressions are imperatively binding by particular calls.

The Court will not interfere with the right of the jury, by assuming any facts, nor will they take upon them to determine what is the true location of the several tracts of land delineated on the plots, or any of them, or the extent or termination of their lines. We will not take upon us to say, whether the tract called David's Fancy, as located by the plaintiff, begins at the right point, or whether there is or is not evidence to the jury of the existence of a tree at the termination of the first line of that tract, which would vary the course, or make it longer or shorter than the thirteenth line of Upton Court. But the Court think, that they are not restricted by the decision in *Dorsey and Hammond*, from giving their opinion hypothetically in the present case, (which they believe to be strictly within the rule established in *Dorsey and Hammond*,) that if the jury should be satisfied from the evidence, that the beginning of David's Fancy is rightly located on the plots by the plaintiff, at the termination of the twelfth line of Upton Court, and there is no evidence to them of the existence of any tree as called for in the grant at the termination of the first line of David's Fancy, which would vary the same from the course or distance of the thirteenth line of Upton Court, that then the expressions contained in the escheat grant do, by operation of law, bind the said escheat land to the true location of the original tract called David's Fancy, as to the two first lines thereof, so far as the jury shall believe that the second line of David's Fancy, the original, did actually extend; and that the first and second lines of the original tract called David's Fancy do, by virtue of the expressions therein used, bind the said lines on the thirteenth and fourteenth lines of Upton Court. Which opinion and direction the Court do accordingly give to the jury. The defendant excepted.

3. The defendant then prayed the opinion of the Court, and their direction to the jury, that as the plaintiff hath in this cause located the land called David's Fancy, surveyed for John Moale on the 1st of November, 1738, different from the land called David's Fancy,

surveyed for David Williams on the 22d of June, 1671, and hath not on the plots located those lands in the same way, the \* plaintiff shall not be permitted to give any evidence to the jury, that the two tracts of land have the same location; and that the plaintiff is concluded by the location he hath given on the plots of the tract of land called David's Fancy, surveyed for John Moale. He further prayed the opinion of the Court, and their direction to the jury, that as the plaintiff hath in this cause located the two first lines of David's Fancy, surveyed for John Moale the 1st of November, 1738, running from the black letter A, then with the black broken and dotted lines No. 1 and No. 2, to the black letter b, and hath given no other location thereof on the plots, the plaintiff is not permitted to give in evidence any other location of the two first lines of that tract; but that the plaintiff is precluded from setting up under the plots in this cause any other location of the two first lines. **266**

*Shaaff* and *Harper*, for the defendant, contended that the plaintiff ought not to give proof different from his allegations. *Hammond* vs. *Norris*, ante 130.

*Martin*, (Attorney-General,) and *Key*, for the plaintiff, cited *Carroll* vs. *Norwood*, 1 H. & J. 167. *Grey et ux.* vs. *Amos*, in the General Court at October Term, 1796, where the plaintiff located his pretensions three ways, neither of which the jury found, although their finding was in favor of the plaintiff, and included more land than he claimed. He took judgment for the land claimed by him within the finding of the jury, and entered a release as to the residue. *Darnall* vs. *Goodwin*, 1 H. & J. 282; *Hicks* vs. *Scott*, in the General Court, on the E. S. *Nicholson* vs. *Hemsley*, 3 H. & McH. 409, where dotted lines were made on plots by the jury, without objection. *Kirkpatrick* vs. *Kyger*, 1 H. & J. 298.

DONE, J. delivered the opinion of the Court. The Court are of opinion, that as the plaintiff has not located his pretensions co-extensive with the location of David's Fancy, the original, surveyed in 1671, he cannot be permitted to give evidence to the jury to extend his pretensions beyond the lines and limits which he has given to the tract of land called David's Fancy, under the escheat grant to John Moale in 1738, but is estopped by that location from going beyond the black letter V, from whence he must run to the \* head of Howard's Branch, at whatever point the jury may find the same to be agreeably to the plaintiff's location of his pretensions, and the location by which the defendant has taken defence. **267**

The Court are further of opinion, that the plaintiff shall not be permitted to give any evidence of the two first lines of David's Fancy, surveyed for John Moale the 1st of November, 1738, running otherwise than as they are located from the black letter A on the plots, with the black broken and dotted lines No. 1 and No. 2, to the

black letter b, as the location of his pretensions; but that the plaintiff is not precluded from giving evidence of any other lines as the two first lines of David's Fancy, the original, by way of illustration; and that the plaintiff may support the location of his pretensions, so far as he can show that the same are located within the limits of the original tract of land called David's Fancy.

4. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that from the place where the jury find the termination of the second line of David's Fancy, the original, the third line thereof must run the number of perches expressed in the grant, and cannot, in its length, be increased or diminished, unless proof is made of the tree called for, or the place where it stood.

DONE, J. The Court direct the jury according to the plaintiff's prayer.

5. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that from the place where the jury find the termination of the third line of David's Fancy, the original, they are competent to run the fourth line thereof to the head of the branch called for at the letter r, the gum tree, or at black-letter F, or at any point between; and that the plaintiff is competent to recover so far as his pretensions are included within the lines of David's Fancy, the original, as found by the jury.

DONE, J. The Court do not think the last prayer is embraced within the decision of the Court already given.

The Court are of opinion, that the fourth line of David's Fancy, the original, must run from the place where the jury shall find the termination of the third line, a straight \* line to the head of  
**268** the branch. That the course in the certificate, and the course located, is but one line.

6. The third bill of exceptions.—The defendant produced and swore Zachariah Maccubbin, as a witness to the jury, to prove, and who did prove, that Richard Moale, under whom the lessors of the plaintiff make title, and John Eager Howard, the defendant in this cause, employed Maccubbin to run the tract of land called David's Fancy, that they both attended at times during the survey, and that on said running, the fourth line of the land was run course and distance, by and with the leased lands of Moale, to a point on Howard's Branch, to or near a gum tree located on the present plots returned in this cause at the little letter r, at the instance of Moale, in order to show the true location of that line. The plaintiff then produced to Maccubbin a plot of the land called David's Fancy, and proved by him that the said plot was the one which he made out for Moale, on the running so made; that the same now produced was the original plot, by the witness made out for, and at the instance of Moale. He further proved, that the lines on this plot are actually located on

the plots in this cause made; and further proved by Maccubbin, that after the same running he also made out a plot for the defendant. He then offered to read in evidence the plot so made out by Maccubbin for Moale. The defendant further proved by Maccubbin, that the corrected lines on the plot were never run on the ground, and that the plot was made out after the survey, at the instance and direction of Moale and that the corrected lines of the plot were drawn upon the plot at the sole direction of Moale, without the knowledge, and in the absence of the defendant. Maccubbin further proved, that he has no recollection whether he did or did not run any of the lines of Upton Court, which are laid down on the plot, and that the whole plot, and all the explanations, were made in the office of Maccubbin, in the absence of the defendant; and that Moale during the time he was employed in making the plot and explanations, frequently was present, and gave him direction about the work. Maccubbin further proved, that the four lines terminating at black letter C, were never run on the ground, and that those lines never were laid down on the plot by the direction or with the knowledge of the defendant, or in his presence; but that the \* waters and branches, designated on the plot, were made by actual survey. The defendant then objected to the reading the plot and explanations to the jury. **269**

*Shaaff*, for the defendant, cited *Jarrett vs. West*, 1 H. & J. 501.

DONE J. The Court are of opinion, that as evidence has been given by the defendant of the runnings of the land, it is proper that the plot should go to the jury, for them to judge of the effect of it in the present question.

The Court do not say whether it would have been evidence originally had it been offered, but as the defendant had offered evidence by the witness, who made the survey, to show Richard Moale did not claim, it is proper the plot should go to the jury.

The Court are therefore of opinion, that the plot and explanations are admissible evidence in the cause, and they are permitted to be given in evidence to the jury. They were accordingly given in evidence to the jury. The defendant excepted.

7. The defendant then prayed the opinion of the Court, and their direction to the jury. That the twelfth line of Upton Court must run as nearly as possible according to the course and distance thereof, as expressed in the original certificate and patent of that tract, so as to strike the branch called for at the end of that line.

DONE, J. The Court are of opinion, and so direct the jury, that the course and distance in a certificate or grant must always be controlled by a call expressed in the same; and that in this case the course and distance must be complied with, as nearly as they can, to strike the branch described to be at the end of the twelfth line

of the tract of land called Upton Court, as the jury may believe the said branch to have existed at the time of the survey of the said land; subject also to the opinion of the jury as to the variation of the compass on the said line.

8. The fourth bill of exceptions.—The plaintiff then read in evidence, the certificate of a tract of land called Oliver's Range, made on the 26th of January, 1722–3, for Thomas Cromwell, in virtue of a special warrant of resurvey to him granted, to resurvey the tract called David's Fancy, granted \* to David Williams on the 1st **270** of May, 1672, for 100 acres; whereby was resurveyed for Cromwell, the said land, with contiguous vacancy added, &c., "lying on the N. side of Patapsco River, and on the W. side of the Middle Branch, beginning at a bounded locust stump standing near the said branch, said stump being a boundary of a parcel of land called Upton Court, and running thence with said land E. 65 perches, still with said land N. E. 230 perches, to the N. W. Branch, then N. N. W. 86 perches, thence S. W. by W. 70 perches, thence W. N. W. 34 perches, to a bounded white oak of John Howard's land, called Timber Neck, standing in a small fork descending into the head of Howard's Branch, thence with the said land S. W. by W. 34 perches, to the head of Howard's Branch, thence bounding on the said branch S. by W. 70 perches, still with said branch S. 27° W. 60 perches, still with said branch S. 56° W. 70 perches, still with said branch S. 50° W. 60 perches to the Middle Branch, thence S. 20° E. 30 perches, thence with a straight line to the said locust stump, containing 183 acres of land more or less," &c. He also offered evidence of ancient runnings of the tract called Upton Court, by which the fourteenth line thereof was run and extended to the N. W. branch of Patapsco River, and that no land has ever been taken up southward of the black letter *b*, and below the red letter L, except what has been held and possessed under the tract called Upton Court, or the land called David's Fancy. The defendant then prayed the opinion of the Court, and their direction to the jury, that the second line of David's Fancy, surveyed for David Williams on the 22d of June, 1671, must be terminated at the end of the 150 perches from the beginning, from whence the third line of that tract must run according to its course and distance, as expressed in the original certificate and patent thereof, and the fourth line from the end of the third line, to the head of Howard's branch.

*Harper*, for the defendant, cited *Thompson vs. Brown*, 1 H. & J. 335; *Dallas vs. Stansbury*, (in the General Court, May, 1801;) *Hammond vs. Ashton*, (*Ibid*, May, 1797;) *Owings vs. Kelly*, (*Ibid*, May, 1796;) *Hellen vs. Garretson*, (*Ibid*, October, 1797.)

*Key*, *contra*, cited *Helms vs. Howard*.

**271** \* DONE, J. This Court are bound by the decision in *Dorsey vs. Hammond*, which must govern in deciding upon the prayer

now submitted. The Court are of opinion, that the termination of the second line of David's Fancy, surveyed for David Williams on the 22d of June, 1671, is a matter of fact to be left to the determination of the jury, on the evidence given to them in the cause. The Court therefore refuse to give the opinion and direction prayed for by the defendant's counsel. The defendant excepted.

9. The fifth bill of exceptions.—The plaintiff then gave in evidence, that the twelfth line of Upton Court terminated at the letter black A, on the plots; that the original tract of land in 1672, called David's Fancy, began at the letter black A; that the certificate of Oliver's Range began at the letter black A; and that the escheat land called David's Fancy, in 1750, granted to Richard Moale, began at the letter black A. And further gave evidence to the jury, that the land on each side of the two lines proceeding from the letter black A on the plots, and running down to the N. W. branch of Patapsco River, has been always held, claimed and considered, as Upton Court and David's Fancy, and that ancient runnings of the said two lines, being the thirteenth and fourteenth lines of Upton Court, were from the letter black A, down to the N. W. branch of Patapsco River. He then read the opinion of the Court, and their direction to the jury, contained in the second bill of exceptions in this cause. And gave in evidence the admissions of the defendant, and the opinion of the Court, that if the tree at the end of the third line of David's Fancy, the original, therein called for, was lost, and no evidence of where it stood was given, then the third line must be run its number of perches, which number could not be lessened or increased, from the place where the jury should find the true termination of the second line. He also gave in evidence the opinion of the Court given on the prayer of the defendant, No. 3. He further gave in evidence, that the true location of the thirteenth and fourteenth lines of Upton Court, and the first and second lines of David's Fancy, the original, are truly located on the plots from letter black A, with the inner black lines 1 and 2, to little black *a*, by the side of the N. W. branch of Patapsco River. \* The defendant then prayed the opinion of the Court, and their direction to the jury, that if they are  
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 of opinion from the evidence, that the original beginning tree of David's Fancy, surveyed for John Moale on the 1st of November, 1738, is proved at the black letter A upon the plots, and that the first line of the land, as run by the surveyor, and expressed in the certificate and patent thereon issued, was run as described on the plots by the black broken line numbered with the black figure 1; and that the second line of the land, as expressed in the certificate and patent thereof, and run by the surveyor, run to the N. W. branch of Patapsco River, at the black letter b on the plots; and that the third line of the land, as described in the certificate and patent run by the surveyor, run to the black letter V on the plots; and that the fourth line of the land as run by the surveyor, and described by the cer-

tificate and patent thereon, run to the head of Howard's Branch, at the black letter i, and from thence with the meanders of Howard's Branch, and to the beginning, that then the certificate, and the patent thereon issued, do not in law operate to pass any land which may be included within the original grant of David's Fancy, surveyed for David Williams on the 22d of June, 1671, except the same may be also included within the metes and bounds of David's Fancy, surveyed on the 1st of November, 1738, as above described; and that David's Fancy, surveyed the 1st of November, 1738, does not, by legal operation, convey all the land contained within the original certificate and patent of David's Fancy, surveyed on the 22d of June, 1671, unless the particular metes and bounds of David's Fancy, surveyed the 1st of November, 1738, shall also include the same.

DONE, J. This point has been decided by this Court in *Gittings, Jun's, Lessee vs. Hall*. The Court therefore refuse to give the opinion and direction prayed for by the defendant's counsel. The defendant excepted.

10. The sixth bill of exceptions.—The plaintiff offered to read the deposition of Windel Lawrence, taken under the survey made in this cause. The plaintiff having proved by Anne Lawrence, a witness sworn in Court, that her husband, Windel Lawrence, who went on board the Norfolk packet, Captain Deagle, to go to Norfolk, about three \* weeks ago. (a) He first said that he intended to go to Alexandria, but the morning he left Baltimore, he informed the witness he would go to Norfolk. That when he departed, he said he should stay till the fall. That the witness hath not seen or heard from him since, and that he informed the witness, that if it suited him, he should remove his family there. That he is a brick-maker by trade. That the witness and his family, consisting of five children at this time, live in Baltimore. The plaintiff also proved by another witness, John F. Holland, that about the 15th of May, 1804, he settled with Windel Lawrence, when he informed the witness that he owed some money; that he must go away if the witness did not supply him. The witness told him that he would, but that he lost so much time by attending as a witness at Annapolis, that he could not advance him any further sum. That Lawrence left the employ of the witness on the 16th of May, 1804, and hath not returned since. That Lawrence had been in his brother's employ for two or three years previous. That it is the general reputation of the neighborhood, that he has left the State, and gone to Norfolk, to work at the brick-making business. The plaintiff also proved by another witness, Joseph Robinson, that he the witness is acquainted with Lawrence, that he informed the witness, at first, that he intended to go to Alexandria, but afterwards told him that he was going to Norfolk, to work at his trade. That

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(a) The trial commenced on the 5th of June, 1804.



this conversation happened sometime about the early part of May, 1804, and that he the witness hath not seen him since. That he left the employment of Holland and Ensor, in Baltimore, where the witness worked with him. The defendant objected to the reading of the deposition in evidence to the jury.

DONE, J. The Court are of opinion, that the deposition of Windel Lawrence is competent and legal evidence to be read to the jury.

This is different from the case of *Darnall's Lessee vs. Goodwin*. There, the deposition was not in the same suit, nor had the witness been in the State for a length of time. Here, every means has been used to obtain the attendance of the witness, and it is in proof that he is out of the reach of the process of the Court. The defendant excepted.

\* 11. The seventh bill of exceptions.—The plaintiff then prayed the opinion of the Court, and their direction to the jury, that although David's Fancy, the original, is located by the plaintiff from A on the plots, with an allowance for variation amounting to six degrees and an half of a degree; and though David's Fancy, the escheat patent, is located from the same place, with an allowance of three degrees and one-quarter of a degree for variation, the jury are not bound by the variation thus allowed, but may find the true location to be by a greater or less variation, as shall appear to them proper from the evidence in the cause. **274**

*Martin*, (Attorney-General,) for the plaintiff, cited *Esp.* 490.

*Shaaff* and *Harper*, *contra*, cited *Hammond vs. Norris*, *ante* 130.

DONE, J. The Court are of opinion, and so direct the jury, that they may, agreeably to the evidence given in this case, find the true location of David's Fancy, under the escheat patent, by a greater or less variation of the compass, as shall appear to them proper from the evidence; provided that by such allowance of variation they are not to enlarge or extend the pretensions of the plaintiff beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V to the head of Howard's Branch, wherever the jury shall find the same to be. The plaintiff excepted.

12. The eighth bill of exceptions.—The Court having given their opinion and direction to the jury, in the seventh bill of exceptions, that the plaintiff had made title to the land called David's Fancy, according to the locations thereof, under and in virtue of the certificates and patents; and the Court having determined that the jury might, agreeably to the evidence given, find the true location of David's Fancy, under the escheat patent, by a greater or less variation, as should appear to them proper from the evidence; provided that by such allowance of variation they were not to enlarge or extend the pretensions of the plaintiff beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn

from the letter V to the head of Howard's Branch, wherever the jury should find the same to be; the plaintiff prayed the opinion \* and direction of the Court to the jury, that if the jury are of  
**275** opinion, from the whole of the evidence, that the true location of the original tract called David's Fancy, and the escheat tract also called David's Fancy, runs from black A, with the inner black lines No. 1 and No. 2, to black a, by the side of the N. W. branch of Patapsco River, and from thence to black figure 3, on the plots, and from the figure 3 to such point or place as they may find from the evidence to be the head of Howard's Branch, that then the plaintiff is entitled to recover the whole of his pretensions located on the plots, which shall lay within the location found by the jury, and is not obliged to abandon any part of his actual located pretensions, by drawing a straight line from V to such place as the jury shall establish to be the head of Howard's Branch.

DONE, J. The Court are of opinion, that the plaintiff cannot recover any land in this action which shall be found to lie without and beyond a straight line to be drawn from the letter V to the head of Howard's Branch, wherever the jury shall find the head of that branch to be, although those lands shall lie within the lines of David's Fancy, according to the true location, as so found by the jury, and also within the lines of the plaintiff's pretensions, as at present located upon the plots. The plaintiff excepted.

13. The ninth bill of exceptions.—The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if he is estopped from showing the true location of David's Fancy, the escheat, different from what is located by him for his pretensions so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff.

*Martin*, (Attorney-General,) and *Key*, for the plaintiff, cited *Com. Dig. tit. Estoppel*, (B) (C;) *Brereton vs. Evans*, *Cro. Eliz.* 700; *Ludford vs. Barber*, 1 *T. R.* 86; *Co. Litt.* 352 a; *Grey et ux. vs. Amos*. (October, 1796.)

DONE, J. The Court are of opinion that the doctrine of estoppel does not apply to the present question. It is doubtful whether estoppel can be brought at all into view \* in the case. The Court  
**276** refuse to grant the prayer. The plaintiff excepted.

The jury returned the following verdict: The jury find the true location of David's Fancy, the original, and David's Fancy, the escheat, to be from the beginning at black A, as described upon the plots in this cause returned, then with the inner black lines 1 and 2, to little black a, on the north-west branch of Patapsco River, and

from the said *a*, the jury find the third line to run to figure black 3, and from thence the jury find the fourth line runs to four perches below big black F, which the jury find the head of Howard's Branch, and from thence, with Howard's Branch and the Middle Branch, binding on the same, to the beginning at A; and the jury find for the plaintiff his pretensions from the said A, with lines 1 and 2, to *a*, and from thence to V, and from V to four perches below big F, which the jury find the head of Howard's Branch, and with the same, binding on the branches to the beginning; and that the defendant is guilty of the trespass and ejectment complained of in the declaration, within the said pretensions, in the manner complained of by the plaintiff. And as to the residue of the trespass and ejectment complained of in the residue of the tract of land called David's Fancy, for which the defendant hath taken defence upon the plots returned in this cause, the jury find the defendant is in no wise guilty thereof. Judgment—That the plaintiff recover against the defendant his several terms aforesaid yet to come and unexpired, of and in all that part of the said tract of land called David's Fancy, in the declaration mentioned, lying, &c. which is contained within the description and finding of the jury, that is to say, beginning at black A, upon the said plots in this cause returned, and running with the inner black lines 1 and 2 to little black *a*, on the north-west branch of Patapsco River, and from thence to V, and from V to four perches below big F, the head of Howard's Branch, and with the same, binding on Howard's Branch and the Middle Branch, to the beginning—and also for costs. As to the residue, &c. judgment for the defendant. The defendant appealed to this Court.

The cause was argued at the last term before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ. on the first, second, third, fourth, fifth, and sixth bills of exceptions, taken by the defendant below.

\* *Harper, Shaaff and Taney*, for the appellant, stated, that the first bill of exceptions embraced three points—1. Whether **277** the Lord Proprietary be not estopped by his grant of Lun's Lot as to all such parts of David's Fancy, (the original,) as are included within the true location of Lun's Lot? 2. Whether the entail created by the patent of David's Fancy, (the escheat,) be docked by the deed of bargain and sale to Croxall? 3. Whether, admitting these two points to be determined in favor of the plaintiff below, any estate in the escheat land passed to the lessors of the plaintiff by the will of John Moale, it not appearing that John Moale entered or died seized?

On the first point they cited *Kelly vs. Greenfield*, 2 H. & McH. 121; *Russell vs. Baker*, 1 H. & J. 71; 2 Blk. Com. 295; *Co. Litt.* 47 b, 352 a; 10 Vin. Ab. 471, 482, 485; *Fairtitle vs. Gilbert*, 2 T. R. 171;

*Hayne vs. Maltby*, 3 T. R. 441; 4 Com. Dig. tit. *Estoppel*, 80, 84; 10 Vin. Ab. tit. *Estoppel*, (B. a;) Co. Litt. 47 a, 363 b, 366 b; and *The Attorney-General vs. Anderson*, 1 H. & McH. 219. On the third point: 5 Bac. Ab. tit. *Verdict*, (D;) *Mahoney vs. Ashton*, 1 H. & McH. 210; Stat. 32 Hen. VIII, ch. 1; 5 Bac. Ab. tit. *Wills and Testaments*, (D. 1;) Stat. 34 Hen. VIII, ch. 5, s. 3, 5; *Wallis vs. Fletcher*, Cro. Eliz. 530; *Ingram vs. Tothill*, 1 Mod. 217; *Bunter vs. Coke*, 1 Salk. 238; 2 Bac. Ab. tit. *Legacies and Devises*, (B) 51, 52; 2 Blk. Com. 310, 209, 227, 228, 312, 323, 332, 338, 375; and 2 Bac. Ab. tit. *Descents*, (C) 30.

That on the second bill of exceptions two questions arise—1. Whether the escheat patent does, by operation of law, relate to the original patent? 2. Whether the expressions used in the original patent of David's Fancy do, by operation of law, bind its second line on the fourteenth line of Upton Court? As to the first question, they cited *The Attorney-General vs. Snowden*, 1 H. & J. 332; *Ratcliffe's Case*, 3 Coke, 40; *Kelly vs. Greenfield*, 2 H. & McH.; 2 Blk. Com. 244; *The Attorney-General vs. Anderson*, 1 H. & McH. 219; and Litt. sec. 348. As to the second question: *Helm vs. Howard*, 2 H. & McH. 57; *Dorsey vs. Hammond*, 1 H. & J. 190; and *Davis vs. Batty*, *Ibid*, 264.

\* That on the third bill of exceptions, the question was, **278** whether a plot in which the defendant below had nothing to do, of the making of which he was ignorant, and which was made for and under the direction of R. Moale, under whom the lessors of the plaintiff claim, could be given in evidence against the defendant, merely because it was in part founded on a survey made at his instance and that of R. Moale? They cited *Anonymous*, 1 Stra. 95; *Bull. N. P.* 247, 248; and *Bridgman vs. Jennings*, 1 Ld. Raym. 734.

That on the fourth bill of exceptions two questions arise—1. Whether the termination of the second line of David's Fancy, (the original,) be not a question of law for the decision of the Court? 2. Whether the true legal construction of the patent of David's Fancy, (the original,) be not to terminate its second line at the end of 150 perches?

On the first of these questions they cited *Gibson vs. Smith*, 1 H. & J. 253; *Gittings vs. Hall*, (on appeal in this Court;) *Dorsey vs. Hammond*, 1 H. & J. 190. On the second, *Gittings vs. Hall*, (on appeal in this Court.)

That on the fifth bill of exceptions, the question was, whether the location of the escheat patent of David's Fancy be not independent of the location of the original, except so far as the lines of the former expressly call to bind on those of the latter? *Helm vs. Howard*, 2 H. & McH. 56; *Dorsey vs. Hammond*, 1 H. & J. 190; *Howard vs. Cromwell*, *Ibid*, 118; and *Hawkins vs. Hanson*, 1 H. & McH. 523.

That on the sixth bill of exceptions two questions arise.—1. Whether a deposition taken on the survey could be read in evidence, unless it appeared that the witness was dead, or removed to a for-

eign country? Whether a mere temporary absence be sufficient? 2. Whether in this case the plaintiff below be not precluded by his neglect from the benefit of this testimony? They cited *Darnall vs. Goodwin*, 1 H. & J. 282; and 1 *Lofft's Gilb.* 60.

That three questions arise upon the record, independent of and unconnected with the bills of exception—1. That the death of one of the lessors of the plaintiff, since the action was brought, and suggested after the jury were sworn, \* makes the proceedings erroneous. 2. That the finding of the jury is uncertain; and 279 3. That the judgment is entered to recover all the several terms stated in the declaration, including the term on the demise of the lessor, whose death was suggested. *Howard vs. Gardiner*, 3 H. & McH. 98; The Acts of 1785, ch. 80, and 1801, ch. 74, s. 38; *Com. Dig. tit. Abatement*; *Aslin vs. Parkin*, 2 Burr. 667, 668; *Parker vs. Harris*, 1 Salk. 262; *Henriques vs. Dutch West India Company*, 2 Stra. 808; *Lampen vs. Hatch*, *Ibid.* 934; *Frederick vs. Lookup*, 4 Burr. 2021; and *Cummings vs. Sibly*, *Ibid.* 2490; *Bac. Ab. tit. Verdict*, (Q,) and *Gittings vs. Hall*, 1 H. & J. 14.

*Johnson* (Attorney-General,) *Key*, *Mason* and *Martin*, for the appellee, on the first bill of exceptions cited, as to the first point, 1 *Pow. on Cont.* 152, 160; *Co. Litt.* 45 a, 47 b, 352 a, 363 b; 2 *Blk. Com.* 245, 346; 10 *Vin. Ab. tit. Estoppel*, 433, pl. 1; 461, pl. 3; 463, pl. 22; pl. 26; 475, pl. 4; 476, pl. 1; *Goodtitle vs. Morse*, 3 T. R. 365; 3 *Com. Dig.* 271; and *Pickett vs. Dowdall*, 2 Wash. Rep. 106. As to the second point, they cited *Calvert vs. Eden*, 2 H. & McH. 279. And as to the third point, they cited *Lux vs. Pellett*, 1 H. & J. 83, (note;) *Taylor vs. Horde*, 1 Burr. 60; 16 *Vin. Ab. tit. Possession*, 455, pl. 1; *Smith vs. Stapleton*, 1 Plowd. 431; *Moore*, 214; *Deux vs. Jeffries*, Cro. Eliz. 352; and *Sachererel vs. Bognott*, *Ibid.* 356. On the second bill of exceptions they cited as to the first question, 2 *Blk. Com.* 244, 245; *Burgess vs. Wheate*, 1 W. Blk. Rep. 146, 163, 166; *Co. Litt.* 215 b; and *The State vs. Reed*, 4 H. & McH. 6. And as to the second question they cited *Dorsey vs. Hammond*, and *Gibson vs. Smith*. On the fourth bill of exceptions they cited *Dorsey vs. Hammond*. On the fifth bill of exceptions they cited *Gittings vs. Hall*, 1 H. & J. 14; *Tolson vs. Lanham*, ante 174; and *Gittings vs. Hall*, (on appeal in this Court.) \* On the sixth bill of exceptions they referred to the Acts of July, 1721, ch. 14, and July, 1779, ch. 8; *Stevenson vs. Myers*, 1 H. & J. 102; *Gilb. L. E.* 60; 1 *Lofft's Gilb.* 214, 218; and *Fry vs. Wood*, 1 Atk. 445. On the alleged errors in the record they cited on the first and third points raised: *Far vs. Denn*, 1 Burr. 362, 363, 364; *Oates vs. Brydon*, 3 Burr. 1897; *Runn. Eject.* 411, 413, 414, 438, 439; *Addison vs. Oatway*, 1 Mod. 252; *Anon.* 1 Salk. 260; *Bull. N. P.* 98; *Thrustout vs. Grey*, 2 Stra. 1056; *Fairclaim vs. Shamtitle*, 3 Burr. 1290; *Aslin vs. Parkin*, 2 Burr. 667; 1 *Bac. Ab. tit. Abatement*, (F.) And as to the second point they cited *Cottingham vs. King*, 1 Burr. 628, 629, 630; *Carroll vs. Norwood*, 1 H. & J. 186; *Darnall vs.*

*Goodwin, Ibid*, 284; *Sullivan vs. Seagrave*, 1 *Stra.* 695; *Camell vs. Clavering*, 2 *Ld. Raym.* 789, *Bindover vs. Sindercombe*, *Ib.* 1470; 2 *Bac. Ab.* 230, 231, 232; and *Whittingham vs. Andrews*, 1 *Salk.* 255.

*Curia adv. vult.*

• THE COURT, (at this term,) concurred in the opinions of the General Court, as contained in the several bills of exceptions taken on the part of the defendant in that Court, and were of opinion, that there was no error either in the judgment or in the record of proceedings.

NICHOLSON, J. I am for affirming the judgment upon all the bills of exceptions; also for the alleged uncertainty of the verdict and judgment; also for the alleged error as to the death of Richard H. Moale. I am decidedly of opinion, that the death of the plaintiff's lessor does not abate a suit in ejectment. In affirming the judgment of the General Court, upon the first bill of exceptions, I wish it to be understood that I do not entertain the most remote idea, that the Lord Proprietary was not liable to be estopped, as other individuals are, or that he had any other of the incidental prerogatives of the Kings of England; he had only such of the direct prerogatives as were expressly granted by the charter.

*Judgment affirmed.*

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\* WILSON'S Ex'rs vs. SLADE *et ux.*

On the issue, joined to a plea of *plene administravit*, the plaintiff did not offer evidence of any assets which had come to the hands of the defendants, (the executors)—*Held*, that it was necessary for the plaintiff to show that assets had come to the hands of the executors, and that the plea was not an admission of assets to the amount of the plaintiff's claim, although the executors did not prove the contrary by the production of the inventory, or by other evidence. (a)

(a) In an action against an executor or administrator who pleads *plene administravit* or "no assets," the burden of proof is on the plaintiff to show assets in the hands of the defendant. *Burgess vs. Lloyd*, 7 Md. 196, (citing the case in the text;) *Seighman vs. Marshall*, 17 Md. 568. In *Giles vs. Perryman*, 1 H. & G. 170, where it was held that an administrator who relies on the general issue plea, has, after verdict and judgment thereon, admitted assets to pay the amount claimed, the Court said: "It was open to the defendant to plead *plene administravit*, or any other plea, going to show a defect of assets, as much as it would have been in an ordinary suit against him upon the promises of his intestate, and if this defence was within his power, and has been pretermitted by him, he is only placed in the situation of many others, who have defended themselves on mistaken grounds. The general issue plea he has chosen to use, and by the verdict and judgment thereon he has admitted assets to pay the debt claimed of him." The plea of *plene administravit* will not protect an administrator unless he has given the notice to creditors required by Code, Art. 93, sec. 110. *Glenn vs. Hebb*, 17 Md. 280. As to plea of no assets by an administrator, see Rev. Code, Art. 64, sec. 129.

APPEAL from the General Court. Debt on the same bond as in the case of the present appellees and Morgan, (*ante* 38.) In this case there were the same pleadings as in that case, with the additional plea of *plene administravit*, and the general replication thereto. At the trial, at October Term, 1803, the plaintiffs, (now appellees,) offered no evidence of any assets which had come from John Wilson, deceased, the defendants' testator, to the hands or possession of the defendants; but contended for, and prayed the opinion of the Court, and their direction to the jury, that on the plea of *plene administravit* it was not necessary for the plaintiffs to show that any assets had come to the hands or possession of the defendants; for that the plea was, unless the defendants proved the contrary by the production of the inventory, or by other evidence, an admission of assets to the amount of the plaintiffs' claim. The Court, [DONE and SPRIGG, JJ.] gave the opinion and direction, on the authority of the case of *Slade and wife* against *Morgan*. The defendants excepted, and the verdict and judgment being against them, they appealed to this Court.

*Johnson*, (Attorney-General,) and *Magruder*, for the appellants.  
*Martin, Hall* and *T. Buchanan*, for the appellees.

THE COURT reversed the judgment of the General Court, upon the same grounds as in the case of *Morgan vs. Slade et al.* (*ante* 38,) and awarded a *procedendo*.  
*Judgment reversed.*

#### JONES *et al.* vs. JONES.

A deed of conveyance, executed by a tenant in tail, and not enrolled within the time prescribed by law, but enrolled thereafter, and after the death of the tenant in tail, under a decree of the Court of Chancery for that purpose, cannot operate against the issue in tail. (*a*)

The Court of Chancery cannot decree that a deed of conveyance, executed by a tenant in tail, may be recorded after the expiration of the time limited by law for the recording of deeds—an estate tail not being within the provision of the Act of 1785, ch. 72, s. 11.

APPEAL from a decree of the Court of Chancery. The bill, filed on the 29th of July, 1799, by the appellants, as complainants, states, that Susanna Jones, mother of the complainants and defendant, being seized in fee tail of a tract of land in Saint Mary's County, called The First and Second Parts of Pountney's Oversight, and

(*a*) Examined in *Posey vs. Budd*, 21 Md. 482. Cf. *Newton vs. Griffith*, 1 H. & G. 111; *Smith vs. Smith*, *post*, m. p. 314. As to the jurisdiction of equity to remedy the omission to record deeds, see Rev. Code, Art. 65, sec. 102; *Somerville vs. Trueman*, 4 H. & McH. 38, note (*a*).

desirous that the same, on her death, should descend to all her children equally, or be subject to her disposition by will, did by **282** \* deed of indenture, in due form of law, executed and acknowledged, together with Mathias Jones, her husband, on the 13th of July, 1797, bargain and sell the same to Benjamin Williams, for the use and behoof of Mathias, her husband, during his life, then to the use of Susanna during her life, and from and after her decease to the use and behoof of such person or persons, and for such estate, and subject to such provisos, &c. as she, Susanna, by any deed, &c. or by her last will and testament, to be by her duly executed, should give, grant, limit or appoint, and for want of such appointment, or until such appointment, to the use and behoof of Susanna, and her heirs, for ever. Shortly after the execution of this deed, it was placed by Susanna in the hands of her husband, to be recorded; and within six months from the execution of the same Susanna was taken ill, and in order to carry into effect the power given by the deed to her to make a will; she sent for a person to write her will, and gave directions for the land to be equally disposed off amongst all her children, but before the same could be formally done, she became incapable of executing it, and died in a short time thereafter. On her death, Mathias, the complainant's father, believing the deed was void, his wife not having been able to dispose of the premises by her will, omitted to have it recorded. That it was owing to the want of information of their father, and his ignorance of the operation of the deed, that he permitted the time to elapse in which the deed should have been recorded, and that it was not owing to any fraudulent design or intention of the party or parties claiming under the deed, that it was not recorded agreeably to law. That their father was also seized in fee in his own right, of a considerable real estate in the said county; that he entertained doubts whether the land mentioned in the deed was actually entailed on his wife, or was her's in fee simple, but on being fully made sensible the same was entailed, and that the deed would have been effectual to dock the entail, though recorded after his wife's death, by which means the land would have descended equally, he, in order to do justice to his younger children, resolved, that unless the defendant would relinquish his claim by primogeniture, and place his brothers and sisters in the same situation with himself, to convey all his own estate amongst **283** the younger children to the exclusion of the \* eldest; but that from sudden indisposition, and a hasty death, the father was prevented from effectuating his determination; and that by his death intestate, his estate descended equally amongst all his children, by which the eldest son, the defendant, claims the whole of the mother's, and an equal share of his father's estate. Prayer, that the deed may be recorded, &c. The defendant demurred to the bill.



HANSON, Ch. (December 16, 1803.) It has on a former occasion (a), been determined by the General Court, on a case submitted, that a deed executed by a tenant in tail, and not recorded within six months, but recorded after the tenant's death under a decree of this Court, should not operate against the issue in tail. This being the case, the party claiming under the deed, has not a title to the land, and therefore the Chancellor conceives, that he cannot with propriety, decree the recording of the deed.—Decreed, that the demurrer in this cause filed be allowed and ruled good, and that the defendant be hence dismissed, but without costs, the Chancellor deciding merely on the opinion of the General Court, in a single instance given and never affirmed by the Court of Appeals.

The Chancellor here takes occasion to observe, that he always decides according to the known opinion of the Court of Appeals, or that of the General Court, where the Court of Appeals has given no opinion; but that there ought to be a distinction between the decision of the Court of *dernier resort*, and of a Court below. The Chancellor knows not but that this suit is instituted for the purpose of obtaining the opinion of the Court of Appeals. From this decree the complainant appealed to this Court.

The cause was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Key*, and *Johnson* (Attorney-General,) for the appellants, referred to the Acts of 1773, ch. 1, and October, 1782, ch. 23; *Laidler vs. Young*, ante 69. The Act of 1785, ch. 72, s. 11; *Pow. on Dev.* 393; *Wills vs. Palmer*, 5 Burr. 2615; and *Hampson vs. Edelen*, ante 64.

*Martin and W. Dorsey*, for the appellee, cited 2 Bac. Ab. tit. *Estate in Tail*, (D,) 553; *Ross vs. Ross*, Chan. \* Ca. 171; *Ridgely vs. McLaughlin*, 3 H. & McH. 220, and *Todd vs. Pratt*, 1 H. & J. 284 465.

CHASE Ch. J. I am of opinion that the decree of the Chancellor be affirmed, with costs.

It is certainly an established principle, that the heir or issue in tail claims the land *per formam doni*, and does not derive his title to it from the tenant in tail, who in respect to said land is nothing more than the conduit pipe through which the title to the land is conducted to the issue in tail, whose claim to it is from the donor according to the gift. The land of the heir, or issue in tail, is not liable to the debts of the tenant in tail, nor is he compellable to execute or fulfil any contract made by his ancestor for the sale or conveyance of said land. The issue in tail cannot be barred of his right, but by fine, common recovery, or deed executed according to Act of Assembly.

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(a) *Ridgely vs. McLaughlin*, 3 H. & McH. 220.

The deed to bar him must be operative in the life-time of the tenant in tail, for immediately on his death the title of the issue attaches. If the deed had been recorded within the six months, it would have operated by relation, from the date of the deed, and would have barred the issue in the life-time of the tenant in tail.

An estate tail is not within the Act of 1785, ch. 72, for recording deeds. The petition must be filed against the heir, devisee, executor, or administrator of the grantor, and with respect to the land entailed, the heir or issue in tail is neither heir, devisee, executor or administrator.

I have shown he cannot be considered as heir. If the land was devised to him by the tenant in tail, he would not take as devisee, but by a title paramount *per formam doni*, which accrues *eo instanti* of the death of the ancestor.

The case of executor or administrator can only relate to estates for years or an estate for the life or lives of others; from all which the conclusion is fair and irresistible, that an estate tail is not comprehended within the Act of 1785.

This question was decided by the Judges of the General Court, on a reference to them by the Chancellor, at May Term, 1794, in the case of *Charles Ridgely, of William*, against *William McLaughlin*, 3 H. & McH. 220, which decision was adopted by the Chancellor, acquiesced in by the parties, and has since been considered as the law.

\* TILGHMAN, BUCHANAN and NICHOLSON, JJ. concurred.  
**285** GANTT, J. dissented. *Decree affirmed.*

#### BROGDEN *vs.* WALKER'S Ex'r, Legatees and Devisees.

The Act of 1797, ch. 114, s. 4, directing, "that if a cause in the Court of Chancery is set down regularly for hearing, or submitted to the Chancellor, and one of the parties dies thereafter, and before a decree passed, the cause shall not abate, and the Chancellor may decree as if such party were alive," cannot take effect in a cause where there might be a decree for a reconveyance of land to the party dead, on paying or bringing money into Court. (a)

A will containing the following devise, viz. "I give and bequeath to my sister E. W. all my real estate during her natural life, and after her decease to my nephew T. W. and his heirs, lawfully begotten: but in case my said nephew should die before he arrives to the age of 21, or leaving issue lawfully begotten, then, &c. T. W. arrived to the age of 21 years, and died without issue—*Held*, that the estate tail was docked by the deed from T. W. to W. B. although W. B. was declared to hold the land conveyed, in trust for T. W. and those claiming under him. (b)

(a) See Rev. Code, Art. 65, sec. 12–24, as to the abatement and revivor of suits in equity.

(b) See *Dallam vs. Dallam*, 7 H. & J. 220; *Cheer vs. Weems*, 1 H. & McH. 265, note.

A bill in the Court of Chancery, (which was afterwards, on the death of W. the complainant, revived in the name of his executor, legatees and devisees,) charged that B. (the defendant and uncle of W.) committed a fraud in procuring W's execution and acknowledgment of deeds conveying his whole estate, real and personal, variant from those he had agreed to execute; that the deeds were intended only as a security for a debt due from W. to B. and not as absolute conveyance in fee simple—Prayer for a discovery, and permission to redeem the property intended to be mortgaged, on paying the debt, and for a conveyance and other relief. Held, without deciding whether or not there was fraud in obtaining the deeds, that the deeds are to be viewed as executed by a weak young man, conscious of his inability to protect his property, or to manage his own concerns, and therefore resolving to place himself under the guidance and protection of an affectionate relation. That it could not be imagined he meant to convey every part of his ample property for the benefit of his kinsman only, and to be absolutely dependent on him for subsistence. The best and fairest construction is, that the deeds were intended to secure to B. a debt, which was trifling in comparison of the value of the property conveyed. Here then was a resulting trust, or here there was an equity of redemption, or here was a silly and imparate young man, who really did not know what he was about, who therefore ought to have the protection of a tribunal, whose peculiar duty it is to watch over idiots, lunatics, madmen and fools? W. was actually apprised of the purport of the deeds, yet it may be said that it was sufficient for B. to have an ample security for his debt, and to screen his nephew from all imposition which might be attempted by others. Decreed, that on payment to B. on or before, &c. of the sum of money expressed as the consideration in the bill of sale, with interest, &c. B. should convey, &c. to the executor complainant, all the personal property, &c. and on payment to B. on or before, &c. of the sum of money expressed as the consideration in the deed of conveyance, with interest, &c. B. should convey, &c. unto the devisees complainants, and their heirs, according to the will of W. the land which was conveyed by W. to B. on, &c. But if the complainants should fail to make payments, &c. there should be sold for the payment to B. of the said two sums of money, with interest, &c. so much of the personal property and land, as should be necessary, &c. (a)

Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case. (b)

The relief which may have been obtained by a complainant who has died, may be granted to his representatives reviving the suit.

A representative, instituting an original suit, may have the same relief which his ancestor, deviser, testator, &c. might have had.

APPEAL from a decree of the Court of Chancery. The bill in this case was originally filed on the 6th of August, 1801, by the testator of

(a) Affirmed in *Cherbonnier vs. Evitts*, 56 Md. 295, where a voluntary deed obtained by fraud and undue influence from the grantor, an old man in feeble health, whose mind was so seriously impaired as to render him incapable of executing a valid deed or contract, was declared void. Cf. *Owings' Case*, 1 Bland, 392.

(b) Approved in *Davis vs. Banks*, 3 Md. Ch. 139, and in *McLaughlin vs. Bank*, 7 Howard, 228. Cf. *Watkins vs. Stockett*, 6 H. & J. 435; *Curtis vs. Moore*, 20 Md. 93; *Cooke vs. Cooke*, 43 Md. 522.

the appellees, in his life-time, and it stated that Brogden, having a claim against him for £450 0 11, applied to him by letter dated the 27th of August, 1800, to secure the payment of the debt by mortgage, and again, by letters dated the 30th of March and 26th of May, 1801; that the complainant, being willing to secure the payment of the debt, consented to give a deed of trust, or mortgage of his property, to Brogden, for that purpose, and by appointment met him at the City of Annapolis on the 17th of June, 1801, to make the requisite conveyance, and on that day executed to Brogden a deed for two tracts of land, the one called Row Downe, and the other Row Down Security, containing together 325 acres, and also a bill of sale of all his slaves and personal estate; but he expressly charged that the same were only intended as a security for the debt, and not as an absolute conveyance in fee simple to Brogden. That the \*com-  
**286** plainant, being the nephew of Brogden, had, at the time of executing the deeds, the most unlimited confidence in his honor and integrity, and not in the least suspecting the purity of his intentions, but on the contrary taking it for granted that the conveyances were deeds of mortgage, or of trust, to secure the payment of the debt, pursuant to the propositions of Brogden in that respect he executed the same without ever seeing them until the moment they were produced by Brogden for execution. That he never read the deeds, nor were they read to him, nor had he any knowledge of their contents, except as before stated, and that he executed them under the fullest conviction they were only deeds of mortgage, or of trust, to secure the payment of the debt, as Brogden never required more, and had no title or demand whatsoever, for a conveyance in fee simple. That the complainant, in January, 1801, attained the age of twenty-one years, and for two years previous had been in the possession of his fortune, which was an ample one, consisting of land, negroes, and stock of all kind, worth at a moderate estimate 6 or £7,000. That coming to his estate at an early period of life, without the ordinary inducements to economy, or with resolution to withstand the temptations of dissipation and extravagance, he had indulged but too freely in the follies of youth, and had been too much addicted to drink, which destructive vice had often incapacitated him for business, and not unfrequently rendered him a dupe to the unprincipled artifices of designing men. That to his utter astonishment, he had lately discovered the deeds to Brogden were absolute conveyance, in fee simple, to him, of the property therein mentioned; and that, impressed with the flagrant injustice of the transaction, he immediately applied to him on the subject, and requested him to have the mistake rectified, which he well hoped he would have done without the least hesitation; but Brogden, in violation of honor and justice, refused to do it, and to the complainant's surprise, offered to reconvey the personal property, and also to convey to him an estate for life in the land, but positively refused to relinquish his claim or title to the lat-

ter in fee simple, alleging that if he did, the complainant would soon dissipate or spend it. That he was prepared, and offered to pay the debt due to Brogden, to secure the payment of which the deeds were executed \* but he wholly refused to take the money, or to reconvey the property, saying he had a conveyance for it, and affected to think he was entitled to it, contrary to the avowed object of the complainant in making the conveyance, the obvious dictates of justice and the established laws of the land. That previous to the conveyance, the complainant had incurred debts to about £1,000, which were fairly and honestly due, but which he was incapable to pay, as the whole of his property had been conveyed to Brogden. The complainant's other creditors were pressing him for payment; that they suspected the conveyances were made with fraudulent intention of cheating them of their honest claims, and have not scrupled to represent the transaction as such, which, to those unacquainted with the real motives of the complainant in making the conveyances, the circumstances afford but too much reason to believe; but he stated that the conveyances were made without any collusion with Brogden, or the most distant view of depriving or defrauding any of his creditors of their just demands, which he was willing and desirous to pay, but which he never could accomplish unless his property was restored to him. That his reputation had sustained a considerable shock, that he was reduced to indigence, and could not obtain credit in the country for a farthing. In fine, that he was a ruined man, unless he could procure relief in this Court. Prayer for a discovery, and permission to redeem the property intended to be mortgaged, on paying the debt, and for a reconveyance, and other relief, &c. The answer stated, that William Brogden, the father of the defendant, died intestate on the 1st of November, 1770, leaving the defendant his heir at law, by which means all the real estate of his father descended to the defendant according to the then existing laws of this State; but that the defendant voluntarily, on the 18th of May, 1775, executed a deed for the lands called Row Downe, and Row Downe Security, to John Brogden, the brother of the defendant, who by his last will, dated the 6th of April, 1782, devised the same to his sister Elizabeth Walker, the mother of the complainant, during her natural life, and after her decease, to his nephew Thomas William Walker, the complainant, and to his heirs lawfully begotten; but in case his said nephew should die before he arrived to the age of twenty-one, or leaving issue lawfully begotten, then the \* real estate should go to his heir at law William Brogden, the defendant. That the defendant had a considerable claim against the complainant, who was the sole representative of his mother, amounting to £450, to be paid which said demand, or to secure which, the defendant was anxious, and he admitted, that for that purpose he wrote to the complainant the several letters referred to. That the complainant never

did consent to secure the claim by way of mortgage, but after the letters were written and received, he came to the defendant and voluntarily, and unsolicited by the defendant, proposed to him to give him an absolute conveyance for all his lands and negroes, the names of which he furnished the defendant with, stating it as his desire to convey all his estate, legal and equitable, to the defendant, and assigning it as a reason, that the estate had been originally conveyed by the defendant to his uncle voluntarily, and it was proper that it should go back to the same person; and also that he, the complainant was surrounded with designing people, whose object was to cheat him out of his property; and that a Mr. Clagett, who held adjoining land, had said that he expected to get the land, and intended to live on it. The defendant thereupon appointed the complainant to meet him at Annapolis, on the 17th of June, 1801, to execute the conveyances. The defendant employed Richard Ridgely, Esquire, to prepare the conveyances, according to the agreement and proposition of the complainant, and he did accordingly prepare the two deeds referred to. That the complainant, agreeably to his appointment, met at Annapolis on the day appointed, quite sober, and called on Ridgely for the deeds, and they were delivered to him. That the complainant carried the deeds to the house of James Mackubin, Esquire, a justice of the peace, and the complainant did there sign, seal and acknowledge, and deliver them to the defendant. That the complainant knew the object of the deeds, and they were designed by him to convey an absolute estate to the defendant. That the deeds were not intended or designed by the complainant or defendant as a security for the payment of any sum of money, or to be in any manner conditional, but were intended and designed, by both the complainant and defendant, to be absolute and unqualified conveyances to the defendant, of all the estate both legal and equitable, of the complainant, in \* the property mentioned  
**289** therein. The defendant denied all fraud, &c.

Testimony was taken under commissions, which it is not necessary to state.

HANSON, C. (22d December, 1803.) In this cause the complainant applied by his bill for a reconveyance. The cause being set down for hearing, the death of the complainant is suggested, and admitted. The Chancellor is now moved to proceed to a hearing and decree under the Act of 1797, ch. 114. And the question is, whether there can be a decree without further proceedings.

On considering the Act of Assembly, it appears to the Chancellor, that whenever he decrees in a case where one of the parties is dead, it must appear to him that the decree may be effectual. In other words, that he cannot decree with propriety where one of the parties is dead, unless his decree is to have substantial operation. In short, it appears to him that the Act is confined merely to cases where

money is, by the decree, to be paid or brought in, or the bill to be dismissed instead of money directed to be paid or brought in. Now, supposing the Chancellor, in this case, of opinion, that there ought to be a reconveyance on paying or bringing in money—is it possible to conceive that the decree is to order money to be brought in or paid by a person who is not a party to the suit, and the conveyance to be made to the same, or another person, who is not a party to the suit. Now, it is clear to the Chancellor, from a view of the Act, if a decree takes place under it, that the decree must be between the parties to the suit. For instance, a decree for relief in this case would direct the deceased to bring in or pay money, and the defendant to convey to the deceased. The Chancellor would suggest, for the consideration of the bar, the question, whether such a decree would not be mere nullity, except that it would show his opinion, and lay a foundation for another suit, in which the representative of the deceased would be a party? But a bill of revivor would certainly be preferable to a new suit.

The Act says, that the decree shall be as effectual as if the deceased were alive, except, &c. There is not a tittle in the Act directing that the decree shall be for or against a representative to the deceased, who was not an \* original party; but suppose it did so direct, how is the Chancellor to know the representative without further proceedings in the cause? Is he to act upon the bare allegation, or on *ex parte* testimony? And if there are to be further proceedings, what can there be better than a bill of revivor? The meaning of the Act appears to be merely confined to this—when one of the parties to a suit dies after a submission, or setting down for hearing, the Chancellor may decree the payment of money to, or by, the deceased, and it shall give such a claim, as is founded on other decrees for or against the estate of the deceased; but the claim shall not be entitled to a preference. There probably may be some other cases; for instance, a decree for recording a deed, where nothing is to be done by the deceased party. The more the Chancellor reflects, the more he is confirmed in the opinion he has expressed, and the more he is convinced of the impropriety, and indeed impracticability, of the Act having an operation more extensive than he has mentioned.

It does not appear to the Chancellor proper to examine a cause merely to see whether he would dismiss the bill, unless the cause be of such a nature that a decree for relief might be effectual. The death of the complainant being suggested, a bill of revivor was filed by his executor and residuary legatees and devisees, stating the former proceedings, and the last will of Walker, &c. to which the defendant answered; in which, among other things, he stated that Walker, the testator, was never married, and died without issue; that the land and premises in question were devised and limited over by the will of John Brogden to the defendant, in case Walker

should die before he arrived at the age of twenty-one, or leaving issue lawfully begotten. That he hath been informed, and believes, that Walker hath made a last will and testament in the manner stated, but believes the same was obtained from him through artifice and by imposition, and that the same was not executed by him at a time when he was of sound and disposing mind. That he should be able to prove, by several respectable witnesses, that Walker, shortly before his death, expressed himself perfectly satisfied with the disposition he has made of his real and personal property to the defendant, the same being made in conformity to his intentions.

**291** \* The commission, by agreement, was opened for taking further testimony; further testimony was accordingly taken, and returned, which it is also unnecessary to state.

It was admitted that the defendant is the heir at law of John Brogden, and that Rebecca Pinkney, one of the complainants, was the half and only sister of Walker, and that he had no brothers or children.

HANSON, C. (February Term, 1805.) This is a case of a most delicate nature, in which the Chancellor earnestly wished a compromise to take place. On this account it is that he has delayed his decision. He must now proceed to the performance of his duty, in giving such a decree as he deems consistent with, and required by, the established principles of equity.

The complainants pray relief on several different grounds—

1. They say the defendant committed a fraud in procuring Walker's execution and acknowledgment of deeds variant from those he had agreed to execute.

2. They say that if even Walker was apprised of the contents of the deeds, they ought to be either vacated or controlled, on account of the defendant's having practiced on an ignorant, imbecile, intemperate young man.

3. They contend, that if both these grounds should fail, and supposing the deeds to be, as they purport to be, deeds of real bargain and sale, the vast inadequacy of price, (£250 current money, the consideration mentioned in each of the deeds,) coupled with the suspicious circumstances disclosed by the evidence, ought to be considered as a foundation for setting them aside, or granting the complainants some other substantial relief.

It is proper for the Chancellor, before he proceeds to a final decision, to remark on two points made on the part of the defendant.

It is contended, that Walker was a tenant in tail; that as he died without issue, and as Brogden was the reversioner in fee, the land must belong to Brogden, unless it can be shown that the entail was cut off. And that if the deed from Walker to Brogden, for conveying the real estate, be vacated, it cannot possibly be considered as having the operation of converting Walker's fee tail into a fee simple



in Brogden, or that, if it has that operation, the fee must remain in Brogden to his own use.

\* The defendant's counsel has also insisted on that established well-known principle in Chancery, respecting the weight **292** of an answer, which the defendant has been compelled to make on oath. It is true that the defendant has in his answer expressly denied all fraud and imposition wherewith he is charged, and that there is not a single witness to refute his answer.

As to the first point, the Chancellor has not the least doubt, that if even Walker had only an estate tail, (which he is satisfied was not the case,) the said estate was completely destroyed by the deed executed to Brogden, and that Brogden, under the deed, was to hold the land, either to his own sole use, or in trust or by way of pledge or security.

As to the other point; the Chancellor conceives, as on other occasions he has declared, that fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances in the case. It is certain, that although the defendant has generally denied fraud, he has denied but few of the matters charged in the bill.

But the Chancellor does not consider himself under the disagreeable necessity of deciding, whether or not there was fraud in obtaining the deeds. He views the deeds as executed by a weak young man, conscious of his inability to protect his property, or to manage his own concerns, and therefore resolving to place himself under the guidance and protection of an able hand and affectionate relation. If it could be imagined that he meant to convey every part of his ample property for the benefit of that kinsman only, and to be absolutely dependent on him for subsistence, he must be deemed very little superior to an idiot. Were he alive, and in the place of the present complainants, who is there that would not declare it the duty of this tribunal to save him from the wretched consequences of an act proceeding from madness, folly, or habitual ebriety, &c.

Supposing the intent of the deeds to have been that Walker should retain his own property during his life, and that afterwards his uncle should have an absolute fee, how different would deeds, properly prepared for that purpose, have been from the deeds executed by Walker. How different too, the Chancellor must say, would have been the circumstances attending the execution and acknowledgment. The best and fairest construction is, that the deeds were intended \* to secure to Brogden a debt, which although **293** greater than Walker might have admitted, was trifling in comparison of the value of the property conveyed, and to put it out of the power of the grantor to squander his estate, and become a prey to designing men. Here then was a resulting trust, or here there was an equity of redemption, or here was a silly, intemperate young man, who really did not know what he was about, and who therefore

ought to have the protection of a tribunal, whose peculiar duty it is to watch over idiots, lunatics, madmen and fools.

The defendant having originally conveyed the land to his brother, from whom Walker derived it, most probably thought it justifiable for him to secure a return of it as soon as the miserable days of Walker should be ended. Let it be supposed that Walker was actually apprised of the purport of the deeds prepared by Brogden's attorney, as is contended by Brogden—what man of intelligence is there, that will not say that it was sufficient for him to have an ample security for his debt, and to screen his nephew from all imposition which might be attempted by others? Who is there that would say if Walker was of sound disposing mind when he made his will, that his will ought not to prevail? And if he was not of sound disposing mind, why was not his will contested?

It has been urged on the part of the defendant, that the complainants are not creditors; that is to say, it is supposed, that not having paid a valuable consideration for Walker's property, they have no claim which ought to be regarded by this Court against the legal title vested in Brogden by the deeds. No! if Walker, during his life, was entitled to relief, his representatives, on every sound principle, are also entitled. When has it ever been decided, by this or any other tribunal, that relief, which might have been obtained by a complainant who has died, shall not be granted to his representatives, reviving the suit? Or, even that a representative instituting an original suit, shall not have the same relief which would have been granted to his ancestor, deviser, testator, &c.

The Chancellor repeats, that the decree he is about to make is not grounded on a conviction that fraud was perpetrated by the defendant. He is clearly of opinion, that the complainants are entitled to a decree in their favor on other substantial grounds. Decree, that if the executor \* complainant, shall bring into Court on or before, &c. to be paid to the defendant, the sum of £250, with interest from the 17th of June, 1801, the defendant, by a good deed, acknowledged and recorded according to law, shall convey, &c. to the executor complainant, all the negroes, &c. And if the devisees complainants, or either of them, shall on or before, &c. bring into Court the like sum of £250, with interest as aforesaid, to be paid as aforesaid, the defendant, by a good deed, &c. shall, give, grant, &c. unto the devisees complainants, and their heirs, as tenants in common, to have and to hold to them, and their heirs, to the use or uses mentioned in the last will of the said Walker, the land, on the said 17th of June, 1801, by the said Walker conveyed unto the said Brogden, being parts of two tracts, &c. But if the said complainants shall fail to bring into this Court the money hereby directed to be brought in on or before, &c. there shall be sold, for the payment to the defendant of the said two sums amounting to £500, with interest, &c. so much of the aforesaid

personal property and land as shall be necessary; the personal property being first to be sold. And N. B. is hereby appointed trustee for making the said sale; and the course and manner of his proceedings shall be as follows, &c. The defendant appealed to this Court.

The cause was argued before POLK, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Ridgely, Key, Shaff and Taney*, for the appellant, cited *Wakelin vs. Walthal*, 2 Chan. Ca. 8; *Company of Peucterers vs. Governor of Christ's Hospital*, 1 Vern. 161; *Walton vs. Hobbs*, 2 Atk. 18; *Speed vs. Martin*, 2 Com. Rep. 588; *Robinson vs. Cuming*, 1 Atk. 473; *Man vs. Ward*, 2 Atk. 228; \* *Villers vs. Beaumont*, 1 Vern. 101; and *The King vs. The Inhabitants of Scamonden*, 3 T. R. 474. **295**

*Martin, Johnson* (Attorney-General,) and *T. Buchanan*, for the appellees, cited *Clarkson vs. Hanway*, 2 P. Wms. 203; *Heathcote vs. Paignon*, 2 Bro. Chan. Ca. 167; *Ardglass vs. Muschamp*, 1 Vern. 237; *Bennet vs. Vade*, 2 Atk. 327; *Chesterfield vs. Jansen*, 2 Ves. 125, 155; *Exel vs. Wallace*, *Ibid*, 324; *Bridgman vs. Green*, *Ibid*, 627; 2 *Pow. on Cont.* 144, 145, 152 to 160; *Osmond vs. Fitzroy*, 3 P. Wms. 129; *Cole vs. Gibbons*, *Ibid*, 290; *Chew vs. Weems*, *ante* 173, *note*; and *Frazier's Case*, cited in *Owings vs. Reynolds*, at December Term, 1810.

*Decree affirmed.*

#### DAVIS' Lessee vs. DAVIS' Heirs.

Where the facts offered in evidence by the plaintiff were not sufficient and legal evidence to warrant the jury in finding that a person, under whom the plaintiff claimed, died seized of the land for which the ejectment was brought, in opposition to 60 years possession of the defendant—The strongest presumption of a good title, being in favor of the defendant.

APPEAL from a judgment of the General Court, rendered in an action of ejectment brought by the appellant. The declaration contained a demise for a tract of land called Brewerton, containing 400 acres, and one for a tract called Linham's Search, containing 38 acres, both lying in Anne Arundel County. There was also a demise for an undivided moiety of the same lands, omitting the quantity of acres contained in each tract. The defendant, (the ancestor of the appellees,) took general defence and issue was joined. The plaintiff, at the trial at May Term, 1805, read in evidence a grant dated the 7th of September, 1659, to John Brewer, for a tract of land called Brewerton, formerly surveyed for William Pyther, lying \* on the west side of Chesapeake Bay, on the west side of the South River, **296** &c. containing 250 acres. He also read certain entries from the rent rolls; by one of them it appeared that a tract of land called Pyther-

ton, was surveyed on the 20th of June, 1652, for William Pyther, lying on the west side of South River, containing 250 acres, and that it was in the possession of James Saunders, for Parnall's orphans. By another entry it appeared, that the tract called Pytherton, surveyed as above mentioned, was granted to John Brewer on the 7th of September, 1659, and called Brewerton, and that it was in the possession of Robert Davis. By another entry it was stated, that the tract called Brewerton was resurveyed on the 9th of November, 1704, for Joseph Brewer, and contained 460 acres, and that the following alienations had taken place, viz. "250 acres.—Robert Davis from William Davis and William Peacock, 12th of September, 1744. 100 acres.—Solomon Weeden and wife from John Gresham, 2d of June, 1744. 100 acres.—John Iiams from Joseph Williams, 12th of January, 1747. 130 acres.—James Maccubbin from Ferdinando Brewer, 12th of October, 1747." He also read the grant for Linham's Search, issued to John Linham on the 12th of June, 1688, and containing 38 acres. Also a deed from William Peacock and William Davis to Robert Davis, dated the 12th of September, 1744, for Brewerton and Linham's Search. He then proved by John Welch, aged 76 years, that when he the witness was a boy in the year 1738, he was at the house of Robert Davis, who was then married to the defendant (a), and lived upon and possessed the lands for which this suit was brought; that Davis always, after his marriage with the defendant, and until his death, lived on the land and possessed the same, and after his death his wife, the defendant, lived upon and possessed the same down to this time, and still does. That he never knew or heard that any person, except Robert Davis and his wife, possessed the land, or any part of it, from the year 1738 down to this time. That Sarah Davis, the defendant, had two sisters who, together with Sarah, were the daughters of Daniel Paine; Sarah was the eldest, married to Robert Davis as above; Frances, the second, married William Peacock, who lived with her some years, and died leaving

**297** \* her a widow; that she remained a widow two or three years and married the deponent's brother, with whom she lived two or three years, and died about the year 1750 or 1751, without issue. That Elizabeth, the third daughter, remained single several years after he first knew the family in 1738, afterwards married William Davis, brother of the above mentioned Robert Davis, by whom she had four children, one of them, the eldest, father of the lessor of the plaintiff in this cause; that she died before her husband, but when he does not recollect. That he knew nothing of the title under which Robert Davis and his wife, the defendant, held the lands for which this suit is brought, but he had often heard that Sarah Davis, and her husband, lived on her father's plantation, and when Frances above named, died, she expressed a wish to be buried alongside of

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(a) She afterwards died, and her heirs were made parties.

her father, and was carried to Robert Davis' plantation, the lands for which this suit is brought, and there buried; that Frances Peacock, above named, when she married the brother of the deponent, was more than twenty-one years of age. The plaintiff then offered in evidence, by cross-examining William Brewer, a witness produced and sworn by the defendant, that he the witness was aged about 73 years; that he had been acquainted with the three daughters of Daniel Paine above named, ever since he was six years old; that Paine had two other daughters, Priscilla, who married and left no issue now living, the other, Ann, who died young and unmarried. That he understood Elizabeth was the youngest of the five daughters; that he had often heard his father say, that Daniel Paine was an Englishman, who got the land in question by his wife; that the four daughters were co-heirs, and got the land by inheritance from their mother; that he understood that Frances and Elizabeth lived in Calvert County with a Mrs. Wilkerson, a relation, till Sarah Davis, her sister, married, when that happened he frequently saw Elizabeth the youngest sister, at Robert Davis', who lived upon the land, and believes she lived sometimes with her sister Davis, and sometimes with her sister Peacock, till she Elizabeth married William Davis. The plaintiff then read certain entries from the parish registers for All-Hallows Parish, viz. "Mary, the daughter of James, and Sary Parnell his wife, was born the 9th day of April, 1697, in the parish of All-Hallows, and baptized the 25th \* day of July, 1698. 298 Priscilla, daughter of Daniel and Mary Pane, was born June 1, 1714. Mary, daughter of Daniel and Mary Pane, was born July 29, 1717. Sarah, daughter of Daniel and Mary Pane, was born May 24, 1720. Frances, daughter of Daniel and Mary Pane, was born August 21, 1722." The plaintiff also proved, that the lands in question are situated in All-Hallows Parish. He also proved that Elizabeth, above named, who married William Davis, died about 12 or 14 years ago, leaving four children, Daniel her eldest son, William, Robert and Mary; that William Davis, her husband, died soon after, about 10 or 12 years ago, that Daniel, the son, died in the life-time of his father, leaving seven children, now alive, of which the lessor of the plaintiff is the eldest. The defendant then read to the Court a patent granted to John Brewer on the 16th of February, 1659, for 400 acres of land, called "Brewerston, lying on the west side of Chesapeake Bay, and on the west side of a river in the said bay, called Road River," &c. She also read to the Court a patent to Joseph Brewer for 460 acres of land, called Brewerston, dated the 20th of March, 1710. This was a resurvey of the last above mentioned tract, devised by John Brewer to his two sons, William and John; that John, the son, devised to Joseph his son. She also read an entry in the rent rolls concerning the said lands, viz. "Brewerston, patented to John Brewer the 16th day of February, 1659, lying in Anne Arundel County, on the west side of Road River, and con-

taining 400 acres. On the 20th of March, 1710, a patent issued to Joseph Brewer for 260 acres of land, lying in Anne Arundel County, being a resurvey on one moiety of a tract called Brewerston, originally granted to John Brewer for 400 acres." She then produced a witness, William Brewer, aged about 73 years, who being duly sworn, deposed, in addition to what has been before stated, that ever since he was six years old he was well acquainted with Robert Davis, and his wife the defendant; that when he first knew them they lived upon the lands for which this suit is brought, and after the marriage of William Davis and Elizabeth Paine, before stated, they, Robert Davis, and Sarah his wife, and no other person whatever, possessed the same, and that they continued so to possess the lands ever after, until Robert Davis died, that after he died, his wife, the defendant,

**299** \* Continued to do so till this time, and now does, and that he the witness had lived all his life, and still lives, adjoining the lands for which this suit is brought. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if they are of opinion from the evidence, that Daniel Payne and Mary Payne died seized of the lands mentioned in the declaration, and find the facts stated by the plaintiff to be true, yet although they should also be of opinion that the facts stated by the defendant are true, the plaintiff is entitled to recover an undivided interest in the lands in the declaration mentioned.

*Key and Johnson*, for the plaintiff.

*Mason*, for the defendant, cited *Esp.* 459, and *Gilb. L. E.* 103, 104.

CHASE, Ch. J. The facts and circumstances disclosed in evidence are not sufficient for the jury to presume a title in the heirs of Parnell, or a deed to Parnell, against the defendant, with sixty years possession. The entries on the rent roll should show a correspondent title. The strongest presumption in this case, of a good title, is in favor of the defendant.

The Court are of opinion, that the facts stated by the plaintiff, although the jury should find them to be true, are not sufficient and legal evidence to warrant the jury in finding that Daniel Payne and Mary Payne were seized of the lands, and died seized thereof, in opposition to the facts stated by the defendant, if the jury should find them to be true. The Court therefore refuse to give the direction prayed. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this Court.

At a former term the death of Sarah Davis, the then appellee. was suggested, and her heirs, the now appellees, were permitted to appear, &c.

The cause was argued before TILGHMAN, BUCHANAN, NICHOLSON. and GANTT, JJ. by

*Johnson*, (Attorney-General,) for the appellant; and by  
*Martin, Ridgely and T. Buchanan*, for the appellees.

*Judgment affirmed.*

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\* LEVERING vs. BOND'S Adm'r.

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In an action of trover for corn placed in the warehouse of the defendants on storage, and which they refused to deliver, but claimed to retain it for the payment of a debt due to them from the plaintiff for articles sold and delivered—*Held*, that as there was no evidence that the corn was delivered to the defendants, to be applied by them to the discharge of the debt due by the plaintiff to them, or was placed in their hands as factors, with authority to sell the same, the plaintiff was entitled to recover.

APPEAL from the General Court. This was an action of trover, brought by the appellee. The plaintiff, at the trial at May Term, 1805, read in evidence a receipt from the defendant, and one Lemmon, since deceased, and whom the defendant has survived, in the following words: "Baltimore, 27th Nov. Received from Mr. Robert Spedding, for account of Mr. William S. Bond, eleven hundred and thirty bushels of corn.

LEMMON & LEVERING."

He also gave in evidence, by the testimony of Robert Spedding, the person by whom the corn in the receipt mentioned was delivered, that the delivery was made the 27th of November, 1798, that the corn was the property of William S. Bond, the plaintiff's intestate, by whom it was delivered to the witness, to be sold for the use of Bond; but without any orders or authority to place it in the hands of any other person for sale, in case he could not dispose of it himself. That not being able to sell the corn, he placed it in the warehouse of Lemmon & Levering, who were in the habit of receiving produce on storage, but made no particular agreement with them relative to the amount of storage to be paid, and gave them no orders or authority to sell or dispose of the corn. He also gave in evidence, that within a few days after the date of the receipt, and some time in the month of November or December, 1798, Bond sent a person to demand the corn from Lemmon & Levering, in his name, who made the demand accordingly, and informed Lemmon & Levering that he was ready to pay the storage, as soon as the corn should be delivered. But that Lemmon & Levering refused to deliver it, declaring that they would retain it for the payment of a debt due them by Bond. The defendant then read in evidence an account, which was admitted in evidence by the plaintiff, for sundry articles sold and delivered by Lemmon & Levering to Bond and one Airs, in which account the corn is credited, and leaving a balance due from Bond & Airs, to Lemmon & Levering, of £13 9 3. He also gave in evidence, that Airs, in the account mentioned, had departed this life

before the time of delivering the corn, and that Bond was then indebted to Lemmon & Levering in the sum of £917 13 4, as by the \* account stated. The defendant then prayed the opinion of **301** the Court, and their direction to the jury, that if they shall be of opinion, from the evidence, and all the circumstances in proof, that the corn was delivered to Lemmon & Levering, to be applied by them to the credit of Bond, on account of the debt due from him to them, or was placed in their hands with authority to sell it as factors, that then, in either of the said cases, the plaintiff is not entitled to recover.

CHASE, Ch. J. The Court are of opinion, that there is no legal evidence, from which the jury can find that the corn was delivered to Lemmon & Levering to be applied by them on account of Bond to the discharge of the debt due from him to them, or was placed in their hands as factors with authority to sell the same. The Court therefore refuse to give the direction prayed. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this Court.

The case was argued before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, JJ. by

*Harper*, for the appellant; and by

*Martin and Key* for the appellee.

*Judgment affirmed.*

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HOPKINS *vs.* STUMP *et al.*

Where a bill had been filed in the Court of Chancery under which testimony was taken and returned, and the bill afterwards dismissed by the complainant, who filed a new bill against the same defendants to obtain the same relief for which the former bill had been filed—on the petition of the defendant, *Held* by HANSON, Chancellor, that the testimony so taken in the former suit be received and read in evidence in the new suit.

The Court of Chancery will not enforce a speculating contract for continental money. Per HANSON, C. (a)

An answer to a bill in Chancery will prevail, unless refuted by the testimony of two witnesses, or of one witness, with equitable circumstances. (b)

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(a) See *Perkins vs. Wright*, 3 H. & McH. 198; *Laurence vs. Dorsey*, 4 Ib. 135.

(b) It is a general rule that an answer responsive to a bill is evidence for the respondent: but the answer of a defendant, when it asserts a right affirmatively, in opposition to the complainants' demand, is not evidence. *Ringgold vs. Ringgold*, 1 H. & G. 12. When the general replication is put in, &c. and the parties proceed to a hearing, if the complainant read the answer as evidence against the defendants, then all the allegations of the answer, which are responsive to the bill, shall be taken for true, unless



If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer plainly, fully and explicitly. If then, any material matter, charged in the bill, has been neither denied nor admitted by the answer, it stands on hearing of the cause for nought. Per HANSON, C. (a)

disproved by two witnesses, or by one witness with pregnant circumstances. But if a cause be heard upon bill and answer only, the latter is to be considered as true in regard to all matters in it, responsive to the bill, which are susceptible of proof by legitimate evidence. *Hagthorp vs. Hook*, 1 G. & J. 271; *Eversole vs. Maull*, 50 Md. 95; Rev. Code, Art. 65, sec. 37, note (a) *infra*.

(a) Affirmed in *Warfield vs. Gambrill*, 1 G. & J. 510, where the Court said: "A respondent submitting to answer must answer fully, but if the answer be defective and insufficient to meet the allegations and interrogatories of the bill, the complainant desiring a fuller response must except to the answer. If he do not, he cannot rely on the silence of the respondent in relation to any material allegation, but must prove it." In *Neale vs. Hagthorp*, 3 Bland, 578, the Chancellor found himself unable to agree with the case in the text and said, that all material allegations of the bill, as to which the answer is entirely silent, are on the hearing to be taken *pro confesso*. But in *Eyler vs. Crabbs*, 2 Md. 154, *Warfield vs. Gambrill*, *supra*, is affirmed. In *Brown vs. Pierce*, 7 Wallace, 211, the Court says: "Authorities are not wanting to the effect that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids are admitted; but the better opinion is the other way, as the 61st rule adopted by this Court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed sufficient. Material allegations in the bill of complaint ought to be answered and admitted or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the respondent in his answer that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact. (Citing *Warfield vs. Gambrill*, *supra*.) Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defence, and the well-known omissions and defects of such an answer may have some tendency to prove the allegations of the bill of complaint, but they are not such an admission of the same as will constitute a sufficient foundation for a decree upon the merits. The proper remedy for a complainant in such a case, is to except to the answer for insufficiency within the period prescribed by the 61st rule: but if he does not avail himself of that right, the answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed."

Under Rev. Code, Art. 65, sec. 37, the answer of the defendant shall not be evidence against the complainant at the hearing, unless the complainant shall read the answer as evidence against the defendant—this provision not applying to motions to dissolve an injunction or to discharge a receiver. In *Warren vs. Twilly*, 10 Md. 47, the Court said that this statute was not intended to apply to the case of a final hearing upon bill and answer, but to the case of a hearing upon bill, answer, replication and proof. In the

If A. has purchased land from B. and paid for it without receiving a conveyance, or if B. holds in trust for A. in either case A. has an interest liable to be taken and sold on a *feri facias*, and the purchaser is entitled to the aid of the Court of Chancery to obtain the legal title. *Ib.* (a)

But if A. has only contracted and given his bond for the purchase money of a tract of land, and received in return a bond of conveyance—Has A. such an equitable interest as is liable to be sold on a *feri facias*, so as to place the purchaser in the room of A? *Ib.*

Whether or not land is bound by a judgment, so far, as that if A. has a judgment against him, and before execution, A. *bona fide* sells his right to B. that C. the plaintiff, may on a *feri facias* take and sell it without inquiring or seeking for other property? *Quere.*

APPEAL from a decree of the Court of Chancery, dismissing the bill of complaint. The bill filed in 1790 charges, among other things, that the defendants, Stump \* and Dallam, being seized in fee  
**302** of a tract of land situated in Harford County, sold a part thereof, (describing it,) to the other defendant, Patrick, and give him a bond for a conveyance thereof to him in fee. That Patrick, at the time of purchase, paid a considerable part of the purchase money, and gave his bond for payment of the residue. That when the bond became due, Patrick tendered the sum of money therein mentioned to Dallam, agreeably to the Acts of Assembly in such case made, but Dallam refused to receive the same. The bill next states, that a judgment was obtained in Harford County Court against Patrick, a *feri facias* issued thereon, which was laid on part of the land purchased as aforesaid by him; afterwards a *venditioni exponas* issued, and under it the land was sold, and was purchased by one Pattison for the complainant, as appeared by the deed of the sheriff executed to the complainant, and accompanying the bill. That under executions, on other judgments against Patrick, the residue of the land was sold to the complainant, who received the sheriff's deed. That Stump had afterwards received the rents of the land, and after the sales made to the complainant Patrick, with a view of defrauding the complainant, gave up the bond of conveyance to Stump. That the complainant had made application to Stump for a conveyance of the lands. The bill prays that Stump may be compelled to execute to the complainant a deed for the lands. The defendants, Stump and Dallam, demurred specially to the bill, assigning for cause, that the bill did not contain any matter of equity whereon the Court of Chan-

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former case the answer is admitted to be true, because the complainant has it in his power to prevent a hearing upon bill and answer. In the latter case, before the above statute, an answer, even after replication, &c. was not only evidence for the defendant, so far as responsive. but such evidence as could not be overcome, except by the testimony of two witnesses or of one with pregnant circumstances. The statute in question relieves a complainant from the operation of this rule. Cf. *Hall vs. Clagett*, 48 Md. 223.

(a) See *Campbell vs. Morris*, 3 H. & McH. 288, note; *McMechen vs. Marman*, 8 G. & J. 57.

very could ground any decree, or give the complainant any relief or assistance against the defendants.

HANSON, C. (October Term, 1800.) The Chancellor understands, that by a recent decision of the Court of Appeals (*Campbell vs. Morris*, 3 H. & McH. 535,) an equitable interest in lands may be sold under a *feri facias*, and that the purchaser stands in the place of the defendant at law. He cannot otherwise than remark, that this decision appears, from transactions in this Court and in the land office, agreeable to the opinion of the late Chancellor ROGERS, as well as of the present Chancellor.

\* But whether or not the complainant, standing in the place of Patrick, is entitled to a decree for vesting in him a legal **303** title, cannot appear, until the matters stated in his bill are admitted, or denied, by the answer; and, if denied, are established by proof. Decreed, that the demurrer be overruled, and that the defendants, Stump and Dallam, who put in the demurrer, be granted time until the third Tuesday of February next to put in their answer to the bill of the complainant.

The defendants answered, and commissions issued, and testimony was taken and returned.

At December Term, 1803, the defendants, by their petition stated that the complainant commenced, in the Court of Chancery, a suit against them for the same cause, and to obtain the same relief for which the present suit had been instituted, and that, in the former cause, it was so proceeded that answers were filed, and a commission issued to examine witnesses, upon which a great number of witnesses were examined, and their testimony returned to the Court, and that thereupon the cause was set down for hearing, and the defendants were ready to show that the complainant was not entitled to relief; but the complainant dismissed his bill, and thereby prevented a hearing of the cause. That several important witnesses, whose testimony was returned in the former suit, are dead, and several others removed out of this State to distant parts, so that their testimony could not be had on the commissions issued in the present suit. Prayer, that the depositions had and taken in the former suit, so dismissed, shall be received and read in evidence at the hearing of the present cause.

HANSON, C. was of opinion, that the defendants were entitled to have their prayer granted; and it was accordingly ordered and decreed, that the depositions in the cause heretofore dismissed, and mentioned in the said petition, be received as evidence on the hearing of this cause.

The testimony taken in the former suit was exhibited, &c. and the cause was argued before the Chancellor, by

*Scott and T. Buchanan*, for the complainant; and by

*Martin*, (Attorney-General,) *Hollingsworth*, and *Shaff*, for the defendants.

**304** \* HANSON, C. (October Term, 1804.) On considering the bill, answers, depositions and exhibits, &c. it appears to the Chancellor, that he cannot grant the prayer of the bill without a violation of several principles in this Court established. In the first place, the contract, of which the complainant claims the benefit, is such a contract as this Court has again and again said it will not enforce. It was a speculating contract for continental money, which, if Patrick the party, instead of Hopkins, were complainant, this Court would not enforce; and it is impossible for any rational man to conceive, that an assignee, or any person claiming in the place of the party, shall be in a better situation than the party himself. But it appears, the idea of the complainant that Stump, in whom alone the legal title now is, was willing to perform the contract, and so stipulated, but that arrangements were made to defeat or defraud the complainant. On this subject the complainant called on the defendants for full explicit answers; but the defendants have, by their answers, explicitly denied the chief important matter charged in the bill.

There is no principle better established than this, that if a defendant be compelled to answer, whatever he says on oath shall prevail, unless refuted by the testimony of two witnesses, or of one witness with equitable circumstances. But the testimony in this case is nothing like such a refutation of the answers of the several defendants, notwithstanding the strong pointed charges made by the complainant.

On the demurrer, the Chancellor long since decided in the complainant's favor so far as this—the Court of Appeals having, as he was informed, decided an equitable interest to be liable to a *fiery facias*, the party who has at a sale on a *fiery facias* purchased fairly an equitable interest, is entitled to the aid of this Court to give him the legal title. This is the plain meaning of the Chancellor's declaration, which however appears to have been misunderstood.

It would seem likewise that the complainant misunderstood the Chancellor in another particular. But no person, acquainted with the laws, or rules or practice of this Court, would conceive it the meaning of the Chancellor, that whatever matter stated in a bill is not denied, must \* be considered as admitted. No! If inter-

**305** rogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer plainly, fully and explicitly. If then any material matter, charged in the complainant's bill, has been neither denied nor admitted by the answers, it stands on hearing of the cause for nought. This assuredly every lawyer will admit.

And now let it be inquired, what is that equitable interest which the Court of Appeals has said is liable to be sold on a *fieri facias*? The Chancellor does not fully understand it. But he readily conceives, that if A. has purchased land from B. and paid for it, without receiving a conveyance, or if B. holds in trust for A. in either case A. has an interest liable to be taken and sold on a *fieri facias*, and the purchaser is entitled to the aid of this Court to obtain the legal title. But if A. has only contracted and given his bond for the purchase money, and received, in return, a bond of conveyance, the Chancellor questions whether A. has such an equitable interest, as is liable to be sold on a *fieri facias*, so as to place the purchaser in the room of A. If such be the meaning of the Court of Appeals, they, in effect, say, that a cause of action or law suit is liable to a *fieri facias*. In short, the Chancellor is inclined to think, that the meaning of the Court of Appeals was, that if A. has a complete equitable title to land, of which the naked legal title is in B. the land is liable to a *fieri facias* on a judgment against A.

The Chancellor cannot conceive, that the contracts for land, which may be deemed to confer an equitable interest, are so far bound by a judgment, as that, after the judgment, and before a *fieri facias*, the parties cannot come to a settlement—For instance, A. gives his bond to B. for \$10,000, the price of Black Acre, containing 500 acres. B. gives in return, his bond to A. in the penalty of \$20,000, conditioned for conveying the said land. These bonds are both dated the 1st of January, 1800. At May Term, 1802, C. obtains a judgment against A. for \$10,000. In November of the same year, A. and B. agree to vacate the contract, and afterwards C. takes out a *fieri facias*, is it reasonable to suppose the law to be, that A. had an equitable interest, which being bound by the judgment of C. could not be given up; and that although A. may have \* personal property, or land sufficient to satisfy the judgment, C. may insist on laying the execution on the contract! for laying it on the land is laying it on the contract. No! The impropriety of the idea is glaring. Another doubt—Supposing equitable interests in, or mere contracts for, land liable to *fieri facias*, at what time are these interests or contracts bound? Are they absolutely bound by the date of the judgments? Or are they to be bound in the same manner as personal property is bound, viz. from the time only of delivering the writ to the sheriff? The Chancellor has always considered it a most important question, never decided, (that he knows of,) whether or not land is bound by a judgment, so far, as that if A. has a judgment against him, and before execution A. *bona fide* sells his right to B., C. the plaintiff may on *fieri facias*, take and sell it, without inquiring or seeking for other property. The Chancellor is not apprised of any decision to this effect, if any such has been. But if such decision has taken place, although he

certainly would govern himself accordingly, he could not do otherwise than question its propriety.

In England, whose laws we follow, lands were, long since, bound by judgment; that is to say, if A. against whom a judgment is obtained, has land, and, after the judgment, conveys it, the plaintiff may notwithstanding, affect it by the writ of *elegit*.

During our connexion with England, its Parliament passed an Act, subjecting lands in America to be sold under a *fieri facias*, in the same manner as personal property, to satisfy judgments, obtained by subjects of Great Britain. The Act did not say a word respecting lands to be bound from the time of the judgment; but it seems, that most or many gentlemen of the bar entertain an idea, that although personal property is only bound by the delivery of the writ, and lands are liable as personal property, the lands are bound from the time of the judgment, to be taken by *fieri facias* at any time afterwards. Supposing the law to be so, and supposing contracts, as aforesaid, liable to *fieri facias*; that is to say, that the purchaser under a *fieri facias* is to be placed in the situation of the defendant at law, the nature of Patrick's contract is such, that as the Chancellor has already intimated, ought not to be enforced, even if Patrick were the complainant, instead of Hopkins.

**307** \* The counsel for the defendants has indeed alleged, that the Chancellor's decision on the demurrer is grounded on a mistake, and that the Court of Appeals never has decided an equitable interest to be liable to a *fieri facias*. If the counsel be right, there is an end to the case at once. But the Chancellor cannot think that the counsel is right, but laments that tribunals, whose decisions are to govern other tribunals, do not give their opinions at large on every important point.

The Chancellor, as is his uniform practice, on every important point, has given his opinion pretty much at large. He might still perhaps be more explicit as well as full, but he conceives that he has said enough. Decreed, that the bill be dismissed. From this decree the complainant appealed to this Court; and on the cause coming on to be argued, and the counsel for the parties declining to argue the case,

*Decree affirmed, nisi.*

#### POE vs. CONWAY'S Adm'r.

In *assumpsit* for work and labor, the Act of Limitations was pleaded—*Held* that evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar. and when a person who was then up the bay should come to town he would have the business settled, was sufficient to defeat the operation of the Act of Limitations. (a)

(a) See *Oliver vs. Gray*, 1 H. & G. 204.

**APPEAL** from Baltimore County Court. Assumpsit brought by the appellee on the 7th of April, 1801, for work and labor, &c. performed by his intestate for Poe, the appellant, on the 4th of September, 1798. The Act of Limitations was pleaded; and at the trial the plaintiff below offered testimony to prove an acknowledgment by the defendant, that the intestate had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town, he would have the business settled. The defendant prayed the Court to direct the jury, that this testimony was not sufficient on the pleadings to prevent the operation of the Statute of Limitations; which direction the Court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

*Martin and Gwynn*, for the appellant. *Hollingsworth*, for appellee.  
*Judgment affirmed.*

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\* BROWNING vs. MAGILL.

308

The purchasing a horse at a public market established by law for the sale of horses, &c. does not entitle the purchaser to hold the horse against the claim of the true owner.

There is no market-overt in this State. (a)

**APPEAL** from Baltimore County Court. Replevin for a horse, brought by the appellee against the appellant. The defendant below pleaded property in himself, and issue was joined. It was agreed between the parties, that if the jury find the property of the horse mentioned in the declaration, to have been in the plaintiff previous to the sale below stated, then the judgment shall be for the plaintiff, subject to the opinion of the Court, upon the following case: A certain Samuel Johnson delivered the horse in question to Richard Culverwell, a person duly authorized by the corporation of Baltimore to sell horses at public sale. On Wednesday the 26th of March, 1799,

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(a) Affirmed in *Levi vs. Booth*, 58 Md. 311, where it was held that a person in possession of goods cannot confer upon another, either by sale or pledge, any other or better title to the goods than he himself has. Independently of the provisions of the statute in regard to the dealings with agents and factors, the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the same as if he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner there must be some other *indicia* of property than mere possession. There must be some act on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances. *Ibid.*

Culverwell sold the horse at the public market at the City of Baltimore, in the market-space established by law, to Browning, the defendant, between the hours of ten and eleven o'clock of the forenoon; Wednesday being the public market day of the said market-space. Browning paid Culverwell \$28 for the horse, fairly and *bona fide*, and without any knowledge that the horse belonged to any other person than the person who had then sold him; and the regular market tolls, and other duties to be complied with agreeably to the regulations of the market in said sale, were discharged. Verdict for the plaintiff; and the Court gave judgment on the case stated and verdict, for the plaintiff. From that judgment the defendant appealed to this Court.

The case was argued before TILGHMAN, BUCHANAN, and GANNT, JJ.

*Martin*, for the appellant. The question is how far property in the hands of a *bona fide* purchaser shall be protected? At common law it is clear, that a purchaser of property in public places, market-overt, is protected. By the custom of London every day is public day for the sale of goods, &c. and the purchaser is protected in his purchase. Every article sold during the hours for selling in shops in London, is legally sold, if it is an article usually sold in such shop. Statute 21 Hen. VIII. c. 11; *Horwood vs. Smith*, T. R. 750; 2 *Blk. Com.* 449; 2 P. & M. c. 7; 31 Eliz. c. 12; 2 *Woodeson Lec.* 412; *Hardw. K. B.* 349; 2 *Azunis Maritime Law*, 366, note. It is necessary for the benefit of commerce that possession of personal property should be *prima facie* evidence of right, and that a *bona fide* purchaser should be protected in his purchase.

*Key* and *T. Buchanan*, for the appellee. A market-overt must be by charter or prescription, and without it there can be nothing like a market-overt. There can be none in Baltimore for the sale of live stock, horses, &c. Even if there is, it has never been considered in this State that a sale divested the property out of the true owner, except in a certain way. It cannot be considered that a newly created market is to be considered as a market-overt.

It may be conceded, that by the civil law the holder of property may sell, but it is denied that this is the law either in Great Britain or in this State. It would be holding out inducements to persons to steal property, and carry it to Baltimore for sale. Our laws contain a better policy, they protect the citizens against rogues. It has been decided in *Wheelwright vs. Depeyster*, 1 *Johns. Rep.* 471, that the English law, in regard to sales in market-overt, is not applicable in the State of New York, where no such institution exists. Nor is it applicable in this State; and if it is, the sale in this case would not be legal.

*Judgment affirmed.*



\* SMITH *et al.* vs. SMITH *et al.*

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T. T. by his will dated in 1795, devised his lands to be equally divided between his two nephews, W. C. and W. S. to them and their heirs forever; and in case W. C. died without lawful issue, then he devised one-half of the lands to his nephew G. S. to him and his heirs forever. *Held*, as to a moiety of the lands devised to W. C. that on his death without lawful issue, the estate tail became extinct—and the limitation over to G. S. took effect, and one moiety of the lands vested in him in fee simple.

The Act of 1786, ch. 45, to direct descents, as to estates tail general, and for transmitting the tenancy in tail to the issue of the tenant, is altered or changed only, by making the land descendible to all the children of the tenant in tail and their respective issue indefinitely. (a)

APPEAL from the Court of Chancery. The bill filed by the appellants stated that William Crandell, being seized in fee of a tract or tracts of land situate in Anne Arundel County, did, by his will dated in 1795, devise the same in fee tail general to William Crandell, of Adam, and to William Smith; and in case the said William Crandell should die without lawful issue, then he devised one-half of the land to his nephew Gilbert Smith. The devise is as follows: "I devise and bequeath unto my dear wife Amelia, during her widowhood, all my tract of land known by the name of Grammer's Parrot, and at the day of her death or marriage, I leave the above mentioned tract of land to be equally divided between my two nephews, William Crandell, son of Adam, and William Smith, to them and their heirs for ever; and in case the above named William Crandell dies without lawful issue, then I give one-half of the above mentioned tract of land to my nephew Gilbert Smith, to him and his heirs for ever." The testator died shortly after the date of the will, without changing or revoking it; and a few years thereafter, both the devisees died minors, and without issue. The testator had no issue, but had one brother and sister of the whole blood, and one brother of the half-blood. The brother of the whole blood was named Adam Crandell, who died before the testator, leaving two children, William, the devisee, and Sarah, the last of whom died a minor, and without issue. Sarah, the sister of the testator of the whole blood, married one Nathan Smith, by whom she had five children, viz., the complainants, Elizabeth and Sarah, and Gilbert Smith, the person named in the will, and Hannah and Sophia Smith, (minors,) the defendants. The complainants stated in their bill, that they were advised, that on the above facts, the disposition over to Gilbert Smith was void, and that all the property devised to the two devisees, had descended to or devolved on them by virtue of the

(a) Overruled by *Newton vs. Griffith*, 1 H. & G. 128; *Posey vs. Budd*, 21 Md. 486. Cf. Alex. Br. Stat. 92.

Act of Descents; but that on account of the minority of two of the heirs, a sale or division could only be effected in this Court. They also stated, that William Crandell, the devisee, was seized in fee of other land, which, on the above facts, descended as above stated; and that the land could only be sold or divided by this Court.

Prayer for a sale of the lands, or \* a partition thereof, as on a  
**315** consideration of all circumstances should seem most advisable, &c. Upon the coming in of the answers of the defendants, which admitted the facts as to the descent, the defendant, Gilbert, submitted the legal construction and operation of the will to the Chancellor, and he, in pursuance of the Act of 1806, ch. 55, requested the opinion of the honorable JEREMIAH TOWNLEY CHASE, Chief Judge of the third judicial district, on the question, "Whether the disposition over to Gilbert Smith was void, so as to leave the land to descend to the five heirs of Sarah Smith, as alleged in the bill; or whether, by the death of William Crandell, of Adam, without lawful issue, the devise of half the land to Gilbert Smith was effectual to give him a title thereto, or, (according to the question raised by the counsel for the complainants,) whether the devise took effect immediately on the death of William Crandell, or whether the land descended to the whole of the heirs of William Crandell?"

Upon this submission and request, the question was argued before Judge CHASE.

*Johnson*, (Attorney-General,) for the complainants.

*Ridgely*, for the defendants.

CHASE, Ch. J. certified the following opinion to the Chancellor: On the question of law, submitted to my decision by the honorable the Chancellor, arising in this case under the will of William Crandell, and the Act to direct Descents, (1786, ch. 45,) it appears to me that the true construction of that Act, as to estates tail general, created and acquired after the commencement of it, is, that the course or manner of transmitting the tenancy in tail to the issue of the tenant, is altered or changed only by making the land descendible to all the children of the tenant in tail, and their respective issue, indefinitely, and not the eldest son, in the first instance, in exclusion of the other children. It could not be the intention of the Legislature to abolish estates tail general, or remainders limited thereon, and to convert them into fee simple estates by giving them the same properties.

The words of the Act must receive such an exposition as they are capable of, and must be so construed as to carry into effect the evident intention of the Legislature. That part of the Act which relates to the collateral relations of the intestate, cannot apply to a tenancy in tail, because such estate cannot descend to collaterals.

As soon as the \* tenant in tail dies without issue, his estate  
**319** and interest in the land ceases, and in the same instant the

limitation over, on the extinction of the estate tail, vests in the remainder-man, and no estate remains in the tenant in tail, which is transmissible to his collateral relations.

According to my judgment, it was not in the contemplation of the General Assembly to alter or change the nature of an estate tail in any other respect than by making it descendible to all the children, and this is plain from the sixth section of the Act. It certainly could not be contemplated by the Legislature to give the estate tail an existence after the failure of the issue of the tenant in tail, contrary to the nature of the estate, and the words of the grant, and in violation of the rights of the remainder-man.

The words of the law must be expounded according to the subject-matter, and that part which relates to collateral relations must *ex necessitate rei*, be confined to estates in fee simple, and cannot comprehend estates which have no existence at the time of the decease of the intestate.

I am of opinion, in this case, as to a moiety of the land devised by William Crandell, that on the death of William Crandell, of Adam, one of the devisees, without lawful issue, the estate tail became extinct, and the limitation over to Gilbert Smith took effect, and one moiety of the land vested in him in fee simple.

KILTY, C. thereupon passed the following decree: The object of the bill in this cause is to obtain a decree for the sale or partition of certain lands therein mentioned, which are alleged to have descended to or devolved on, the complainants and defendants, as the children of Sarah Smith, who was the surviving sister of William Crandell, but which lands could not be sold or divided on account of the minority of two of the said heirs. (The Chancellor here stated the facts of the case and then proceeded.)

After hearing the arguments of the counsel on the trial, the Chancellor considered it the most proper course to request the opinion of the Chief Judge of the third judicial district, as he is empowered by law to do. And on this request, and the answer thereto, which are among the proceedings, the opinion of the Chief Judge was declared as follows: "As to a moiety of the land devised by William Crandell, \* that on the death of William Crandell, son of Adam, one of the devisees, without lawful issue, the estate tail be-  
320  
 came extinct, and the limitation over to Gilbert Smith took effect, and one moiety of the land vested in him in fee simple."

In conformity to the opinion thus expressed—Decreed by the Chancellor, that the complainants are not entitled to a sale or partition of that part of the land of William Crandell which by the will was devised to Gilbert Smith, in case William Crandell therein mentioned should die without lawful issue, and that a decree for such sale or partition ought not to be made.

The decree goes on to direct a sale of the other land.

The complainants appealed to this Court. But the case having been compromised, it was at the present term, *Dismissed.*

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AMOSS *vs.* ROBINSON *et al.*

A. R. being indebted, as deputy sheriff and deputy collector, to R. A. suits were brought on his bonds as such, and judgments obtained thereon. A few days before the judgments were obtained, A. R. conveyed the whole of his real and personal estate to A. J. and R. B. who were sureties for him in the bonds before mentioned. R. A. filed a bill against A. R. A. J. and R. B. charging that the conveyance was fraudulently executed, with intent to deceive and injure him, and though apparently for the consideration of £200, was in truth executed without consideration of money, but intended to guarantee and indemnify A. J. and R. B. as sureties in the bond; that A. R. retains possession of the property, and has sold a part thereof for his own benefit. Prayer for a disclosure of the trusts, and vacation of the deed, and for general relief. A. J. in his answer, stated that A. R. was indebted to him for money paid as his surety to other persons, and also indebted to him on open account, and for money lent. *Held* that the real and personal property, and increase, if any, remaining in the hands of A. R. A. J. and R. B. or any of them, be sold for the purpose of paying, in the first place, the sum of money due to R. A.

APPEAL from a decree of the Court of Chancery. The bill in this case was filed by the present appellant against Archibald Robinson, Abraham Jarrett, and the administrators of Ralph Bond. It stated that the complainant had been sheriff and collector of Harford County, and that he appointed Robinson one of his deputies, who gave two bonds, one as deputy sheriff and the other as deputy collector, conditioned for the faithful performance of his duties; that in the bond as deputy sheriff, Jarrett was his surety, and in that as deputy collector Ralph Bond was his surety. That Robinson having greatly defaulted in his duty, and being largely in arrear to the complainant, suits were brought on both the bonds and judgments obtained against him on each bond at March Term, 1790, for a large sum of money. That Robinson, being seized and possessed of considerable real and personal estate, and for the purpose of fraudulently deceiving and injuring the complainant, a few days before the obtention of the judgments against him, conveyed his real estate to Jarrett and \* Bond, in fee simple, apparently and for the pre-  
**321** tended consideration of £200, when in truth the conveyance was executed without consideration of money, and intended to guarantee and indemnify Jarrett and Bond as sureties in the said bonds, who have never been damnified, or paid the complainant anything on account of Robinson, but hold and enjoy the real estate, and also the personal property of Robinson, also conveyed to them since the judgments, as a further indemnity. That they have permitted Rob-

inson to sell part of the personal estate for his own use and benefit, &c." Prayer for a disclosure of the trusts, and vacation of the deeds, &c. and for general relief.

The answers of the defendants admit that the deeds were executed for the purpose of indemnifying and securing Jarrett and Bond, as securities for Robinson. That Jarrett had become Robinson's surety to other persons, and he had a claim against him also on an open account, and for money lent, and the conveyances were not only to secure him as surety to the complainant, but also to secure the payment of the money due, or for which he was so answerable, to other persons. That the defendants were ready and willing that the property should be sold, and the proceeds applied to the discharge of the claims due Jarrett and Bond, and the residue to discharge Robinson's debts. The answers also stated, that Robinson was prevailed upon to confess judgments upon the terms of all payments and discounts made appear, to be allowed, and which the complainant now refused to allow, and that they can prove, that but a small sum of money, if any, is due on the judgments, upon a fair and just settlement.

Testimony was taken under a commission as to the amount due to the complainant, and the account was audited by the auditor, stating the sum of £295 6 8, current money, exclusive of interest, to be due to the complainant, and £148 18 10, current money, exclusive of interest, due to Jarrett from Robinson.

HANSON, C. (December Term, 1804.) When a man becomes security for another, and is answerable for his debt, the Chancellor cannot conceive there is any fraud in the principal's conveying property to secure him, and likewise to secure the payment of any advances that may be afterwards made by the security. In short, the Chancellor \* does not perceive that the creditor, having taken a surety for his debt, has a right to vacate any conveyance made to the surety by the principal for the purpose of counter-security. The situation of the surety would be hard if the rule were otherwise. The circumstance of the sureties afterwards becoming insolvent, supposing that to be fairly a part of the case, which it is not, the Chancellor conceives has no effect on the case. But inasmuch as the surety, to whom the conveyance is made, is answerable to the principal, and is to be considered as trustee to the principal for any surplus remaining after the surety is secured, and the law gives a recourse to the equitable interest of a man against whom a judgment has been obtained, the Chancellor is of opinion, and it is adjudged, ordered and decreed, that the land conveyed to the defendant, Abraham Jarrett, as stated in the bill, be sold for the purpose of paying, in the first place, the debt due from Robinson to Jarrett, and then to discharge the debt due to the complainant; the said debts being established, or to be established, by this Court.

That John Moores, Esquire, be and he is hereby, appointed trustee for making sale, &c. From this decree the complainant appealed to this Court.

The cause was argued before POLK, BUCHANAN, and NICHOLSON, JJ., by

*Ridgely, Key, and T. Buchanan*, for the appellant; and by *Johnson*, (Attorney-General) for the appellees.

THE COURT reversed the decree of the Court of Chancery, with costs; and decreed that the land and personal property conveyed to Jarrett and Bond, by Robinson, in the bill of complaint, together with the increase, if any, of the personal property which remained in the hands of the appellees, or any of them, be sold under the direction of the Court of Chancery, for the purpose of paying, in the first place, the debt due from Robinson to the appellant, amounting to the sum of £512 12 11, current money, adjudged and decreed by this Court to be due to the appellant, with interest from the 7th of July, 1808, until paid, and also the complainant's costs in the Court of Chancery. Also decreed, that the Chancellor appoint a trustee for the purpose of making sale of the said real and personal property, and that the course and manner of \* his proceedings shall be  
**323** pursuant to the directions of the Chancellor in that respect; and also that the Chancellor pass such order and decree in the premises as may be necessary for carrying this decree into full effect.

*Decree reversed.*

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#### NEGRO CATO *vs.* HOWARD.

A slave sold by parol for a term of seven years with an agreement between the vendor and vendee that at the end of the seven years he was to be manumitted, by the vendee. At the end of that time the vendee executed a deed of manumission. *Held*, that the slave was free.

APPEAL from Montgomery County Court. This was a petition for freedom, preferred by the appellant. At the trial he offered evidence to the jury to prove, that in January, 1793, Nathan Harris was the owner of the petitioner; that by parol he sold him to Jesse Harris in that year, for seven years, for £65, and at the end of that time the petitioner was to be free. Jesse and Nathan Harris, at the time of the sale of the petitioner, did agree by parol, and it was part of the bargain, that Jesse should at the end of seven years, from the time of the sale, or sooner if he pleased to do so, manumit and set the petitioner free. The petitioner was delivered by Nathan to Jesse, and served Jesse until about the month of January, 1799. In February, 1799, Nathan, without the consent of Jesse, sold the peti-

tioner as a slave to Howard, who soon after took the petitioner into his custody as a slave, and still holds him as such. On the 2d of March, 1799, Jesse executed a deed of manumission of the petitioner, which was duly acknowledged and recorded. Nathan, after his sale to Jesse, several times declared that he had no right to the petitioner, and that Jesse was the person who was to set him free. On these facts the petitioner prayed the opinion of the Court, and their instruction to the jury, that if they were of opinion from the evidence, that Jesse Harris purchased the petitioner from Nathan Harris in the year 1793, for seven years, and that it was part of the terms of sale and purchase, that Jesse should, at the end of seven years or sooner, if he chose to do so, set free and manumit the petitioner, that the petitioner was entitled to his freedom for life by the aforesaid deed of manumission, if the petitioner was, at the time of the execution of that deed, of healthy constitution and sound in mind and body, and capable by labor to procure sufficient food and raiment, with other requisite necessities of life, and was not more \* than forty-five years of age. But the Court, (CLAGETT, Ch. J.) was of opinion, and so instructed the jury, that if they should find that the sale and purchase between Nathan and Jesse Harris, was as above stated, that the petitioner is not entitled to freedom under the deed of manumission. The petitioner excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before TILGHMAN, POLK, and BUCHANAN, JJ. by

*Martin*, for appellant, and *Mason*, for appellee.

*Judgment reversed, and procedendo awarded.*

#### HUGHES vs. O'DONNELL.

Where the attorney of the plaintiff had given the defendant a receipt for a sum of money, stated to be in full of the judgment, but which was for a less sum than the amount due—*Held*, that the receipt was not conclusive evidence that the judgment was satisfied so far as to prevent the plaintiff from taking out execution on the judgment for any balance which might be actually due thereon. (a)

APPEAL from Baltimore County Court. This was an action on the case, for maliciously causing the plaintiff, (now appellee,) to be taken in execution, and falsely imprisoned, on a judgment which had been satisfied, &c. The general issue was pleaded.

1. The plaintiff, at the trial, offered in evidence a record of a judgment, and proceedings thereon, in a suit wherein the defendant (now

(a) See *O'Neale vs. Lodge*, 3 H. & McH. 250, note.

appellant,) was plaintiff, and the plaintiff, (the appellee,) was defendant, setting forth, that at May Term, 1800, a judgment was recovered in the General Court, by the then plaintiff, for £110 4 0 current money damages, and \$61 50 and 1,363 lbs. of tobacco, costs. That on the 3d of February, 1801, a *ca. sa.* issued on the judgment, and was served on the then defendant. The plaintiff also offered in evidence the following receipt of Zebulon Hollingsworth, Esquire, attorney for the plaintiff in the judgment, to prove its payment and satisfaction: "4th August, 1800. I have this day received of John O'Donnell, Esquire, the sum of one hundred and forty pounds one shilling and ten pence, in full of the within judgment.

Z. HOLLINGSWORTH, Att'y for C. HUGHES."

The defendant then offered to show, that the above receipt was given by mistake for a less sum of money than was due on the judgment. But the Court were of opinion, \* that the receipt was  
**325** conclusive evidence that the judgment was satisfied, so far as to prevent the plaintiff therein from issuing any execution for any balance that might in fact be due. The defendant excepted.

2. The plaintiff further offered in evidence, that the defendant in this cause, notwithstanding the receipt, and the notice thereof, ordered an execution to issue for the whole amount of the judgment, without endorsing thereon the sum of money so received on account thereof, and directed the whole amount to be executed for. The defendant then moved the Court to direct the jury, that notwithstanding the receipt, if there was any balance due on the judgment, that the plaintiff in the judgment might take out an execution for the same. But the Court was of opinion that the receipt, purporting to be in full of the judgment, Hughes was so far bound thereby that he could not take out execution for any balance which might be actually due. The defendant excepted. The verdict and judgment being for the plaintiff, this appeal was brought by the defendant.

The case was argued before TILGHMAN, BUCHANAN, and GANTT, JJ. by

*Harper*, for the appellant. The receipt in this case, though expressed to be in full of the judgment, was not so, and not being so, was not conclusive satisfaction of the judgment, and an execution might issue for the balance, and the plaintiff in the judgment was not bound to endorse the sum of money which had been paid. The authority of an attorney at law ceases after the judgment is entered, and he has no right to enter the judgment satisfied, when in fact it is not so. He may perhaps receive payment, and give a receipt therefor; but he has no right to enter the judgment satisfied. He may say what he has received, and as far as that payment goes, it probably is a discharge. *Howard vs. The Levy Court*, 1 H. & J. 566.



*Purviance* and *S. Chase, Jr.* for the appellee. The authority and extent of the powers of an attorney are fully laid down and recognized in the following authorities: *Latuch vs. Pasherante*, 1 Salk. 86; *Lamb vs. Williams, Ibid.*, 89; *Powell vs. Little*, 1 W. Blk. 8; *Welch vs. Hole*, 1 Doug. 238; 1 Roll. Ab. 291, pl. 17, 21; 1 Bac. Ab. 188; 1 Com. Dig. 40; *Read vs. Drupper*, 6 T. R. 361; *Randle vs. Fuller, Ibid.*, 456; *Ormerod vs. Tate*, 1 East, 464.

\* THE COURT dissented from the opinions expressed by the Court below, in both of the bills of exceptions. **327**

*Judgment reversed, and procedendo awarded.*

### RATRIE vs. SANDERS.

Where the defendant was in possession of, and holding a slave, for the space of three years antecedent to the institution of an action of replevin against him for the slave—*Held*, that the Statute of Limitations was a bar to the plaintiff's recovery, notwithstanding the property in the slave had been in the plaintiff, and the slave was by him loaned for an indefinite time to J. S. who during that loan sold the slave to the defendant; and although the suit was brought within three years from the time the plaintiff knew of such sale.

APPEAL from Montgomery County Court. The appellant brought an action of replevin against the appellee, for a negro slave called Jane, to which *non cepit infra tres annos*, and *actio non accrevit infra tres annos*, and property in the defendant, were pleaded. The defendant, at the trial, prayed the Court to direct the jury, that if they were of opinion from the evidence, that the defendant had been in the possession of Jane for the space of three years prior to the institution of this suit, holding her as his own property, that then the Act of Limitations was a bar to the plaintiff's action. But the Court, (CLAGETT, Ch. J.) refused to give the direction; but did direct the jury, that if they were satisfied that the property in said slave was in the plaintiff, and that he lent her for an indefinite time to Joseph Sanders, and during that loan Joseph Sanders sold her to the defendant, that by the sale the defendant stood in the same situation that Joseph Sanders had stood in, and that the Act of Limitations did not begin to run against the plaintiff until \* he knew of the sale by Joseph Sanders to the defendant. **328**  
The defendant excepted; and the verdict and judgment being against him, he brought the present appeal.

The case was argued before TILGHMAN, POLK, and BUCHANAN, JJ. *Key*, for the appellant, referred to the Act of 1715, ch. 23, s. 2. *Mason*, for the appellee.

*Judgment reversed, and procedendo awarded.*

GRAY and BIDDLE *vs.* WOOD *et ux.*

An action on a promissory note, endorsed in blank, by the payee, may be maintained in his name for the use of the holder, although the holder paid a valuable consideration to the payee at the time of the endorsement. (a)

A promissory note is not invalidated by being antedated.

**APPEAL** from Cecil County Court. An action of assumpsit was brought in the names of the appellees, for the use of Benjamin Sluyter, upon a promissory note dated the 1st of January, 1801, executed by the appellants, and payable on demand to Elizabeth, (the female appellee,) whilst she was *sole*, by the name of Elizabeth Hugg, or order. The general issue was pleaded.

1. At the trial, the original note was produced by the plaintiffs in support of their action, and there appearing a blank endorsement in the name of the payee, Elizabeth Hugg, which the defendants proved to be her hand-writing, the defendants insisted that the note was transferred by the endorsement to Benjamin Sluyter, of which the institution of the suit for his use was an evidence. The defendants also offered testimony to show, that at the time this endorsement was made, Sluyter paid a valuable consideration for the note to Elizabeth Hugg, with a view to contend that the whole interest of the payee, in the note passed to Sluyter, and that the action ought to have been in his name as endorsee. But the Court, (TILGHMAN, Ch. J. and PURNELL, A. J.) refused to let the testimony go to the jury, and were of opinion that the same was inadmissible. The defendant excepted.

2. The plaintiffs then called the subscribing witness to the note, to prove the execution of it, who proved that the note was executed by the defendants, and attested by him the witness, but not on the 1st of January, 1801; that the note was antedated, and he did not know on what day it was executed. The defendants then prayed  
**329** the Court to \* direct the jury, that this was not sufficient and proper evidence to go to the jury, to support the issue joined on the part of the plaintiffs. But the Court were of opinion, that the evidence was competent and proper, and permitted it to be given. The defendants excepted; and the verdict and judgment

(a) Affirmed in *Williamson vs. Allen*, 2 G. & J. 355. It was held in *Ringgold vs. Tyson*, 3 H. & J. 172, that the holder of a promissory note endorsed in blank cannot recover in his own name. But by Code, Art. 14, sec. 8, judgments on negotiable instruments shall not be reversed because endorsed in blank. The effect of this provision is to give to a plaintiff all the advantage from a blank endorsement that he could derive from an endorsement in full, and a holder may fill up endorsements in blank at any time. *Whiteford vs. Burckmyer*, 1 Gill, 127; *Dunham vs. Clogg*, 80 Md. 284; *Elliott vs. Chesnut*, *Ibid.* 562.

being for the plaintiffs, this appeal was prosecuted by the defendants.

The cause was argued in this Court before BUCHANAN, NICHOLSON, and GANTT, JJ. by

*Cosden*, for the appellants; and by

*Earle, Barroll and Carmichael*, for the appellees.

THE COURT concurred with the County Court in the opinions expressed in both of the bills of exceptions. *Judgment affirmed.*

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DAVIS *et ux.* vs. WALSH.

W. D. becoming an insolvent debtor, his real estate was sold by his trustee, and purchased by C. D. to whom a deed was executed. C. D. in making the purchase, acted professedly as a friend to W. D. so far that if he could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he could not raise the purchase money, it became necessary to sell a part of the estate to reimburse C. D. which part W. D. and M. his wife, was desirous to preserve to themselves, and were anxious to procure a friend to become the purchaser for and on behalf of M. the wife, and as a trustee for her; which intention, previous to the sale, was made known to R. W. who approved of it, and it was agreed that J. S. should be the nominal purchaser, and R. W. was to be his surety for the purchase money. J. S. became the purchaser, and it was known and understood, at the time, that he purchased for M. the wife of W. D. R. W. became surety for J. S. and W. D. has always been in possession of the premises. W. D. having part of the purchase money applied to R. W. to obtain a bond of conveyance from C. D. to M. the wife of W. D. for the property, when he was informed by R. W. that he had got a bond to himself, as J. S. had given it all up to him, and that W. D. had nothing to do with it. J. S. had been induced, in order to secure R. W. to direct C. D. to give a bond of conveyance to R. W. who assured J. S. that no advantage should be taken of W. D. and that when he paid the purchase money, a deed should be executed to his wife M. The premises were conveyed by C. D. to R. W. who brought an action of ejectment against W. D. The amount of principal and interest, of the purchase money, was tendered by W. D. to R. W. and a deed demanded, which he refused to execute. W. D. and M. his wife, filed their bill against R. W. to be quieted in their possession of the premises, and to compel a conveyance from him to M. the wife—*Decreed*, that R. W. convey the land in question to W. D. and M. his wife, in fee simple, and that an account be stated, &c. and the balance due be paid at the time R. W. shall convey the land. (a)

APPEAL from a decree of the Court of Chancery, dismissing the bill of complaint. The bill stated, that Davis being seized of a valuable real property, and also possessed of a considerable personal

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(a) See as to charging a party with interest on rents and profits, *Chase's Case*, 1 Bl. 232; *Winder vs. Diffenderffer*, 2 Bl. 204; S. C. 3 G. & J. 329.

estate, consisting, among other things, of certain chattels real, and being also indebted to divers citizens of this and of the United States, beyond what he was able to pay without a greater indulgence than his creditors were disposed to grant him, was compelled, sometime in the summer of the year 1787, to apply to the Chancellor for the benefit of the Act of Assembly respecting insolvent debtors;

that in consequence \* thereof Stephen Wilson and Robert  
**330** Lemmon were appointed trustees on behalf of the creditors of Davis, and that he executed to them, on the 10th of October, 1788, a deed of all his real and personal property. That the trustees proceeded to sell, and did sell a part of the property to Cumberland Dugan, for the sum of £1,310 current money, and on the 6th of November, 1792, the trustees executed to Dugan a deed for the property so to him sold. That Dugan, in making the purchase, acted professedly as the friend of Davis, so far, that if he Davis could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he was not able so to do, it became necessary to sell the property, or a part thereof, to raise the purchase money, and to indemnify Dugan; and that Dugan being about to sell the property, and among the rest the following five lots, distinguished on a plot of Baltimore Town by the numbers 950, 951, 952, 953 and 954, which lay connected and adjoining each other, on which Davis had a house, in which he resided with his family, and also a garden adjoining the house, which Davis and his wife were particularly desirous to preserve for themselves, but thinking themselves not able to purchase the whole of the lots, they were anxious that the lots should not be sold together, but subdivided into three or more subdivisions, each to be sold separately, and one of the subdivisions to include the house and garden; and in that case it was agreed that a friend should become the purchaser of the subdivision including the house and garden, for and on behalf of Mary, the wife of Davis, and as a trustee for her, and that upon the purchase money being paid, the subdivision, so to be purchased, should be conveyed to her; and the better to effect this design, Davis and wife conversed with Walsh, the defendant, who professed himself a very warm friend to Davis and wife, and requested him to endeavor to prevail on Dugan to sell the lots in subdivisions, to enable Mary, the wife of Davis, by the intervention of a friend, to become the purchaser, fully disclosing to Walsh the intention of Davis and wife, that the wife should thus become the purchaser of that subdivision which should include the house and garden. Walsh perfectly approved Davis and wife's design, and promised to give his assistance for its completion, but declared, that in preference to applying to Dugan himself,

\* he would apply to Major Thomas Yates, the auctioneer,  
**331** and solicit him to procure Dugan thus to subdivide the property, and as an encouragement for Dugan so to do, he would let Yates know that in such case he, Walsh, would purchase one of the

subdivisions, consisting of meadows. That Walsh accordingly applied to Yates to procure a subdivision of the lots, informing Yates that it was intended the subdivision, in which the house and garden were included, should be bought in, in trust for the wife of Davis; and Yates, in consequence, prevailed on Dugan to subdivide the lots into three subdivisions, in such manner that one of them, containing nearly one acre of ground, should include the house and garden. That Davis and wife agreed with Joseph Stockton, who married the sister of the wife of Davis, to be the nominal purchaser of the house and garden for the wife of Davis, and to attend the sale and bid off the said subdivision for her, with which Walsh was fully acquainted. That Davis, the morning before the sale, applied to Walsh to be the security of Stockton for complying with the terms of payment, provided Stockton purchased the house and garden on behalf of the wife of Davis, which Walsh agreed to do. That both Davis and wife, as well as Walsh and Stockton, attended the sale; that Stockton bid for the subdivision, including the house and garden, and it was struck off to him for the sum of £135, that being the highest bid for the same: and that Walsh became the purchaser of the other two subdivisions, giving for the one £90, and for the other £83. That Walsh, Dugan, and others, well knew that Stockton bid for the wife of Davis; that this was repeatedly mentioned, and that publicly, during the auction, and while he was bidding for the property. That by the terms of the sale, one-third of the purchase money was to be paid in three months from the day of sale, one-third in six months, and the other third in nine months, and that the sale was made on the 15th of June, 1792, before which time Wilson and Lemmon had made their sale to Dugan, although they did not execute the deed to Dugan until some months after. That Stockton executed and delivered to Dugan a bond, with Walsh his surety, for payment of the purchase money for the subdivision purchased by Stockton for the wife of Davis; the money to pay for which was to be furnished and provided by Davis; and that Walsh executed and delivered to Dugan a \* bond, with Stockton his surety, for the purchase money of the other two subdivisions. **332**

That Davis and wife have had the constant actual possession of the subdivision so bid off by Stockton, ever since the said purchase. That the day of the sale, Davis was at the house of Stockton, when Dugan was there with bonds to be executed for the purchase money, and Davis observed that they ought to state the money was for the house and garden, but Dugan replied, it was immaterial, for that he would at any time give a bond for the conveyance thereof. That sometime after the sale, Davis called on Walsh, and told him he thought it time for Dugan to give his bond to convey the house and garden; for that he, Davis, had procured a great part of the sum first to be paid, and that he, Davis, wished to have a bond for the conveyance before he made the payment; whereupon, after a short

estate, consisting, among other things, of certain chattels real, and being also indebted to divers citizens of this and of the United States, beyond what he was able to pay without a greater indulgence than his creditors were disposed to grant him, was compelled, sometime in the summer of the year 1787, to apply to the Chancellor for the benefit of the Act of Assembly respecting insolvent debtors;

that in consequence \* thereof Stephen Wilson and Robert  
**330** Lemmon were appointed trustees on behalf of the creditors of Davis, and that he executed to them, on the 10th of October, 1788, a deed of all his real and personal property. That the trustees proceeded to sell, and did sell a part of the property to Cumberland Dugan, for the sum of £1,310 current money, and on the 6th of November, 1792, the trustees executed to Dugan a deed for the property so to him sold. That Dugan, in making the purchase, acted professedly as the friend of Davis, so far, that if he Davis could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he was not able so to do, it became necessary to sell the property, or a part thereof, to raise the purchase money, and to indemnify Dugan; and that Dugan being about to sell the property, and among the rest the following five lots, distinguished on a plot of Baltimore Town by the numbers 950, 951, 952, 953 and 954, which lay connected and adjoining each other, on which Davis had a house, in which he resided with his family, and also a garden adjoining the house, which Davis and his wife were particularly desirous to preserve for themselves, but thinking themselves not able to purchase the whole of the lots, they were anxious that the lots should not be sold together, but subdivided into three or more subdivisions, each to be sold separately, and one of the subdivisions to include the house and garden; and in that case it was agreed that a friend should become the purchaser of the subdivision including the house and garden, for and on behalf of Mary, the wife of Davis, and as a trustee for her, and that upon the purchase money being paid, the subdivision, so to be purchased, should be conveyed to her; and the better to effect this design, Davis and wife conversed with Walsh, the defendant, who professed himself a very warm friend to Davis and wife, and requested him to endeavor to prevail on Dugan to sell the lots in subdivisions, to enable Mary, the wife of Davis, by the intervention of a friend, to become the purchaser, fully disclosing to Walsh the intention of Davis and wife, that the wife should thus become the purchaser of that subdivision which should include the house and garden. Walsh perfectly approved Davis and wife's design, and promised to give his assistance for its completion, but declared, that in preference to applying to Dugan himself,  
\* he would apply to Major Thomas Yates, the auctioneer,  
**331** and solicit him to procure Dugan thus to subdivide the property, and as an encouragement for Dugan so to do, he would let Yates know that in such case he, Walsh, would purchase one of the

subdivisions, consisting of meadows. That Walsh accordingly applied to Yates to procure a subdivision of the lots, informing Yates that it was intended the subdivision, in which the house and garden were included, should be bought in, in trust for the wife of Davis; and Yates, in consequence, prevailed on Dugan to subdivide the lots into three subdivisions, in such manner that one of them, containing nearly one acre of ground, should include the house and garden. That Davis and wife agreed with Joseph Stockton, who married the sister of the wife of Davis, to be the nominal purchaser of the house and garden for the wife of Davis, and to attend the sale and bid off the said subdivision for her, with which Walsh was fully acquainted. That Davis, the morning before the sale, applied to Walsh to be the security of Stockton for complying with the terms of payment, provided Stockton purchased the house and garden on behalf of the wife of Davis, which Walsh agreed to do. That both Davis and wife, as well as Walsh and Stockton, attended the sale; that Stockton bid for the subdivision, including the house and garden, and it was struck off to him for the sum of £135, that being the highest bid for the same: and that Walsh became the purchaser of the other two subdivisions, giving for the one £90, and for the other £83. That Walsh, Dugan, and others, well knew that Stockton bid for the wife of Davis; that this was repeatedly mentioned, and that publicly, during the auction, and while he was bidding for the property. That by the terms of the sale, one-third of the purchase money was to be paid in three months from the day of sale, one-third in six months, and the other third in nine months, and that the sale was made on the 15th of June, 1792, before which time Wilson and Lemmon had made their sale to Dugan, although they did not execute the deed to Dugan until some months after. That Stockton executed and delivered to Dugan a bond, with Walsh his surety, for payment of the purchase money for the subdivision purchased by Stockton for the wife of Davis; the money to pay for which was to be furnished and provided by Davis; and that Walsh executed and delivered to Dugan a \* bond, with Stockton his surety, for the purchase money of the other two subdivisions. **332**

That Davis and wife have had the constant actual possession of the subdivision so bid off by Stockton, ever since the said purchase. That the day of the sale, Davis was at the house of Stockton, when Dugan was there with bonds to be executed for the purchase money, and Davis observed that they ought to state the money was for the house and garden, but Dugan replied, it was immaterial, for that he would at any time give a bond for the conveyance thereof. That sometime after the sale, Davis called on Walsh, and told him he thought it time for Dugan to give his bond to convey the house and garden; for that he, Davis, had procured a great part of the sum first to be paid, and that he, Davis, wished to have a bond for the conveyance before he made the payment; whereupon, after a short

pause, Walsh replied, to the amazement of Davis, that he Walsh, had got a bond for the conveyance, and that Davis had nothing to do with it. Davis then asked Walsh what he meant by having a bond of conveyance, as he, Walsh, was only the surety for Stockton who purchased it in trust for the wife of Davis? Walsh replied, he meant that Stockton had given it all up to him. Davis then told Walsh that when the first payment became due he expected to make the payment, and that he did not want Walsh to pay for him, to which Walsh answered with warmth that Davis had nothing to do with it. That Stockton (as Davis and wife are informed and believe,) being about to leave this State and go to Pennsylvania, where he now resides, was induced in order to secure Walsh, to direct that Dugan should give the bond of conveyance to Walsh, Walsh at the same time assuring Stockton that no advantage should be taken thereof, but that whenever Davis paid the purchase money, the wife of Davis should have a deed executed to her for the same. That some months after the sale, Davis went to Dugan, and offered to pay him \$200, which he had then ready to pay him, and to give Dugan security for the residue, provided he would give up the bonds which Stockton had executed, with Walsh as his surety, and offered to make payment of the residue in sixty days, but Dugan declared he could do nothing without consulting Walsh, and that he, Dugan, must make the conveyance to whomsoever Stockton directed, saying that he did not know Davis in the transaction, although at the same

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\* time Dugan acknowledged that he knew Stockton purchased the property for the wife of Davis; and that Stockton had so mentioned in his, Dugan's presence, to Walsh, and also that Stockton made Walsh promise that she should have it when Davis paid the money for which it was purchased. That Davis was always willing and desirous to have paid the purchase money according to the contract, and several times applied to Dugan on the subject, and also to Walsh as being the surety, for payment of the same. That Dugan always alleged that he did not know Davis in the business, and that he had conveyed, or must convey, the property to Walsh; and when Davis applied to Walsh, he insisted Davis had nothing to do with the property, and that it belonged to him, Walsh. That Dugan hath actually conveyed the house and garden, and the lot on which they are situate, to Walsh; and that sometime in June last Walsh claimed of Davis £30, as rent for one year for the premises, and distrained for the same, although Davis saith that he never rented the premises of Walsh, or agreed to pay him any rent therefore, but always claimed the same in consequence of the said purchase; and that Davis was obliged to replevy the goods so distrained by Walsh. That Walsh hath instituted an action of ejectment in the County Court of Baltimore against Davis, to recover the possession of the four lots Nos. 951, 952, 953 and 954, which include the property so purchased by Stockton. That within



the last thirty days Walsh also served Davis with a notice, as if he had been a tenant of Walsh, to leave the premises within thirty days from the notice, in order to institute proceedings against Davis under the Act, entitled, "An Act to provide a summary mode of recovering the possession of lands and tenements holden by tenants for years, or at will, after the expiration of their terms." That on the 15th of February last, Davis did actually tender to Walsh the whole amount of the principal and interest of the purchase money, for which Stockton purchased the property, and demanded that Walsh should convey the same to the wife of Davis, and that Walsh refused to receive the money, or execute a conveyance. Prayer, that Davis and wife may be quieted in their possession of the premises; and that Walsh may be compelled by a decree to convey to the wife of Davis the property so purchased by Stockton for her use. Prayer also for *subpœna*, \* and for an injunction, &c.

The answer of Walsh, the defendant, admits that Davis **334** applied for the benefit of the insolvent law, and that the trustees named became entitled to his estate as the bill alleges, but the defendant has no knowledge whether any agreement ever took place between the complainants and Dugan, that in case the purchase money was obtained by them he was to convey the same to them. The defendant admits that the lots of ground mentioned were sold by Dugan at public sale as stated; and the defendant saith, that the complainant, Mary, came to him previous to the sale thereof, and mentioned to him that she and her husband were desirous of purchasing that part on which the improvements of a small house and garden were made, but expressed her apprehensions that they would be unable to accomplish the payments at the limited periods, and asked the defendant if he would consent to take the same to his own account, in case they were so unable, and the defendant did consent to do so. That at the sale of the property, which was distributed into three parts, the defendant became the purchaser of two-third parts thereof, and that Stockton became the purchaser of the remaining third part, including the house and garden, as the defendant was informed and believes, in trust for Davis, in the event of his making the payments in 3, 6 and 9 months, that being the time limited at the sale thereof. That the defendant became the security of Stockton for the purchase money of the third part, to Dugan, and at that time also informed Stockton that he had made the promise, hereinbefore stated, respecting the same, to Mrs. Davis. That before bonds for the conveyance of the lots of ground were executed by Dugan, the complainants severally came to the defendant, and informed him that they had determined not to have any thing to do with the purchase made by Stockton, and requested the defendant to take the whole upon himself, and obtain a bond in his name for the conveyance thereof; at that time also the defendant consented to take the same upon himself, but observed to the com-

plainant Davis, that it would be proper for him and Stockton to call on Dugan and request that the bond of conveyance should be executed to the defendant only. That shortly after this conversation, Davis and Stockton informed the defendant that they had waited on Dugan for that purpose. That at \* another day, **335** previous to the execution of the bond of conveyance, Davis in conversation with the defendant relative to the property, and in order to induce the defendant the more readily to take the purchase upon himself, informed him that Peter Litzinger, the proprietor of the adjoining ground, would sell the same on reasonable terms, and advised the defendant to purchase the same, as he would thereby obtain the whole front on both sides of the street; and the defendant did accordingly purchase the opposite front from Litzinger. The defendant afterwards obtained the bond of conveyance in his own name; that he was pressed to take the same both by Stockton and Davis. That at the stipulated periods he paid the purchase money to Dugan, and has since obtained conveyances in fee for the whole of the property; and at the request of Stockton executed to him a bond of indemnity against the payment of the purchase money to Dugan. That Davis, at the time of the sale of the property, was considerably indebted to the defendant for goods sold and delivered, and that on that account he is now indebted to the defendant in the sum of more than £50. That after the defendant made the first payment for the property to Dugan, he informed Davis that he must pay £30 per annum rent. That he always considered himself entitled to recover that sum, and that Davis was his tenant at that rent, and compellable to the payment thereof by distress. That under this impression, and in consequence of Davis' refusal to pay the same, he levied a distress, and instituted such process for the recovery of the possession of the property, as stated in the bill. The defendant doth positively deny that he either, directly or indirectly, ever promised or gave any other assurance to the complainants, or either of them, or to Stockton, that whenever they paid the purchase money he would execute a conveyance for the third, or any other part, to Mary, one of the complainants. That he does not believe any tender of money, on account of the pretended claim of the complainants, was ever made to any person, until nearly two years after the sale, when Davis came to the defendant's house, and told him that he came to tender him money for the property now possessed by the complainants, when the defendant answered, that as he had neither sold, nor promised to sell him, any ground, he could not receive any on that account, but would be **336** thankful to receive and \* apply the same to their credit for goods sold to Mrs. Davis two years before, which Davis refused, observing that that account should be paid in due time. That since the property hath been in the possession of Davis, the same hath suffered great injury, and the defendant has reason to

apprehend, and doth believe, will be almost wholly ruined if suffered to remain with him; and the defendant is restrained from taking the possession thereof. The defendant doth positively aver, that he hath never, since the purchase of the property, promised or bound himself to permit the complainants the privilege of paying up the principal and interest of the purchase money, and taking the property; and expressly denies any trust whatever for their benefit. He denies the fraud and oppression charged by the complainants, &c.

A motion to dissolve the injunction was made by the defendant, which being submitted,

HANSON, C. stated, that the bill and answer were by him read and considered, and it appearing that the equity stated in the bill, on which the injunction was obtained, is fully denied by the answer; and there being no circumstances to induce the Chancellor to continue the injunction until final hearing, or further order, it is adjudged and ordered, that the injunction be, and it is hereby dissolved.

Commissions issued for taking testimony, which were executed and returned, containing the following evidence.

Joseph Stockton.—He affirmed that in the year 1793 he was present at the sale of a house and lot situated on Hampstead Hill, at the head of Bond Street, in the City of Baltimore, that the sale was made by order of Cumberland Dugan, the owner of the property, under the superintendence of Major Yates, an auctioneer; that at the time of the sale, the premises were divided into three parts or parcels; that the affirmant, at the instance and request of Mary Davis, one of the complainants, with the knowledge and approbation of her husband, the other complainant, became the purchaser of the first part or parcel, of the premises, whereon a house and garden were erected and laid out; that at the time of the sale it was publicly announced by the auctioneer, and was understood by the defendant, who was present, that the affirmant made the \* purchase as agent, and for the use of the complainants, that the 337 defendant became the purchaser of the other two lots, parts or parcels of the premises; that the affirmant bid £130 for the lot which he bought, and that the defendant bid a larger sum (how much the affirmant cannot recollect,) for the two parts which he bought. That the affirmant and Walsh became mutually bound for each other unto Dugan, for the price of their respective purchases. That a few days after the sale, when the affirmant was about to leave Baltimore, it was agreed, by and with the knowledge and consent of all the parties, that Dugan should convey the whole of the premises, as well the lot purchased by the affirmant, as the other two lots, to the defendant; that when such conveyance was agreed upon, Davis declared it was done in confidence, and, as the affirmant understood, upon trust, that so soon as the defendant should be relieved from

bill in this Court to say whether or not there was an agreement between him and the complainant, and what it was, his answer, with respect to the nature of that agreement, is to be taken altogether. For instance, says the bill of A.—B. contracted with me, by parol, for the consideration of \$5,000, to sell me 300 acres of land in Baltimore County, of which he put me in possession, but I was to have credit for five years without paying interest. B. in his answer, admits that there was a parol contract for the land, and possession given as stated; but instead of having credit as aforesaid without interest, A. was to give him bond, with security, for paying with interest in three years. Will common sense suffer a construction as, that because B. admits a contract and possession he must be considered to have admitted everything necessary for A's purpose, unless he can prove, on commission, that the contract was as stated in the answer? No! the absurdity is glaring. But if B. had admitted the matters stated in the bill to be facts, but went on and said that afterwards, A. for the consideration of \$100, had agreed to give up the purchase, &c. that \* part of the answer must be proved on  
**343** commission, unless A. on interrogatories, had admitted its truth.

The Chancellor thinks proper to make a remark, which ought to have come before—supposing Stockton really bound to convey on receiving the purchase money on or before such a day, inasmuch as the complainants were under no obligation whatever to take the purchase off Stockton's hands, and inasmuch as he had no valuable consideration, the utmost they could claim in reason would be to take the purchase off his hands by paying the money on the day stipulated. Suppose this case—they do not bring him the money on that day—property has fallen so much in value that it is not for their interest to take it on or before the day. He cannot compel them to take it. . He does not wish to keep it, but to get free of it on the best terms. He sells it for \$500 less than it cost him. Ten years after this the property is worth three times as much as it cost Stockton. Then, indeed, Davis and wife, whether or not they have money, can contrive to redeem, or claim it to advantage, provided it can be so redeemed or claimed. Well—the purchaser from Stockton, or the purchaser from that purchaser, or the purchaser from the second purchaser, is obliged, on Davis' application, to convey him the property on his paying, &c. It is really an affront to common sense to say that Davis' claim ought to prevail.

The Chancellor has given his ideas at large. He might refer to decisions of the Court of Appeals, which if there be a judgment to be formed from decrees, the reasons of which are not assigned, are more strict with respect to agreements set up against the intent of the Statute of Frauds than the Chancellor has ever seen.

The Chancellor indeed has always thought that it would have been much better to construe the Statute of Frauds strictly against con-

tracts. However he has always endeavored to conform to decisions, which on any principle might be considered as binding on him. He has never intentionally decided against any decree of the Lord Chancellor of England, made before the Revolution, or even any decision of Chancellor ROGERS, which hath not been controverted, unless on a bill of review. As to the present case, he is satisfied, that by decreeing a dismissal of the bill, he will contravene the principle of no decision in equity, which ever hath been given. Decreed, that the bill of \* the complainants be dismissed, and the defendant be dismissed, but without costs. **344**

From which decree the complainants appealed to this Court. And the case was argued before CHASE, Ch. J. NICHOLSON and GANTT, JJ. by

*Martin*, for the appellants; and *Harper*, for the appellee.

THE COURT reversed the decree of the Court of Chancery, and decreed that the appellee convey the land in question to the appellants, in fee simple, and pay to them all the costs in the Court of Chancery, and in this Court, and all the costs incurred by Davis at law in defending the action of ejectment prosecuted against him by the appellee, and that the appellee restore the possession of the land to the appellants. Also, that an account be taken of the principal money and interest paid by the appellee for the land, at the respective times he paid the same, and that the appellants be charged therewith; and that an account also be taken of the rents and profits of the land, which have accrued and been received by the appellee since he took possession thereof; and in stating the account between the parties, the appellee be charged therewith at the respective times he received the same, with legal interest thereon; and that the balance of the money which may be due, on the adjustment of the said account, be paid to the party to whom it shall be due, whether appellants or appellee, at the time the appellee shall convey the land. And that the Chancellor make all necessary rules and orders for having this decree carried into full and complete effect.

*Decree reversed.*

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M'COY, Garn. of KINGLA vs. SWAN'S Adm'r.

An administrator may issue an attachment or warrant under the Act of 1795, ch. 56.

APPEAL from Washington County Court. This was an attachment on warrant under the Act of 1795, ch. 56; and the affidavit, on which the warrant was granted, was made by the administratrix, stating that Kingla, (the original defendant,) was *bona fide* indebted to her, as administratrix, on two promissory notes drawn

**345** by Kingla, and \* payable to her intestate, or order, &c. The attachment was laid in the hands of M'Coy, (the appellant,) who appeared, and moved that the proceedings on the attachment might be quashed. But the County Court refused to grant the motion, and judgment of condemnation was rendered, &c. From that judgment this appeal was prosecuted.

The case was submitted to the Court without argument.

*T. Buchanan*, for the appellant. *Hughes*, for the appellee.

*Judgment affirmed.*

DAVIS vs. WILSON *et al.*

A paper certified in a record transmitted on appeal, purporting to be a bill of exceptions taken at the trial, was held not to be a bill of exceptions in the case, it not appearing that the seals of the Judges of the Court below had been affixed to it. (a)

The Court of Appeals having reversed a judgment of the Court below, on the form of proceeding, there being a material variance between the writ and the declaration refused to remit the record with a *procedendo*. (b)

APPEAL from the County Court of Baltimore. The record in this case contained a bill of exceptions, tendered to the Associate Justices of the County Court by the defendant, (the appellant,) and which was signed, but not sealed, by the Justices.

*W. Dorsey* and *Brice*, for the appellant, contended, that there was a material variance between the writ and the declaration; the former being in the names of William Wilson, and others, and the latter in that of William Wilson alone.

They were proceeding to argue the points raised on the bill of exceptions, when it was discovered that it had not been sealed, as before stated.

(a) Affirmed in *Wilburn vs. State*, 1 Md. 13, and in *Ellicott vs. Martin*, 6 Md. 517. Each distinct exception, embracing an independent proposition of law, must be signed and sealed by the Court below before it can be regarded as a valid exception. *Ellicott vs. Martin*, *supra*. Where an exception sealed, but not signed, is made part of a subsequent exception which is sealed and signed, the Court will notice the first exception. *Hopkins vs. Kent*, 17 Md. 113. Cf. *Alex. Br. Stat.* 132; 2 *Poe's Pldg.* secs. 310-326.

(b) In *Evans' Prac.* 569, it is said that the doctrine of the case in the text appears to have been overruled. In *Smith vs. Gorton*, *post*, 367, a *procedendo* was awarded in a case in which the Court affirmed the judgment on the bill of exceptions, but reversed it upon the form of proceeding. The law seems to be settled, that whenever, on the reversal of a judgment, a *procedendo* is proper to attain the ends of justice, it will be granted. See *Rev. Code*, Art. 71, sec. 21.

THE COURT were about to reverse the judgment on the form of proceedings, and to award a *procedendo*, when

*W. Dorsey* contended, that a *procedendo* ought not to be awarded in a case where the Court do not reverse on a bill of exceptions.

THE COURT considered that there was no bill of exceptions in the case, the seals of the Justices not being affixed thereto; but there was error in the form of proceeding, and reversed the judgment without awarding a *procedendo*. *Judgment reversed.*

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\* WAGNER vs. M'DONALD.

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A paper was exhibited for record as the last will of C. W. proved to have been signed by him at a time when he was about to leave the State. It was written somewhat in the form of a letter, and stated "If I should not come to you again, my son M. shall pay," &c. Evidence was given that C. W. went to Kentucky, and returned, and that he lived for several weeks thereafter—*Held*, that the paper could not be admitted to record as the last will of C. W. (a)

APPEAL from the Orphans' Court of Frederick County. A paper, purporting to be the will of Michael Wagner, written in the Dutch language, of which the following is a translation, was exhibited to the Orphans' Court for record by the appellee, who had married Elizabeth Schreiner, one of the legatees therein named, viz. "In the name of God, Amen. If I should not come to you again, my son Michael Wagner shall pay, out of Christian Wagner's bond, which I have from him, to Elizabeth Schreiner seventy pounds, and that in the year 1798, the 10th of May; and to Michael Roether thirty pounds in the year 1799, the 10th of May. The remaining fifty pounds you shall divide amongst you; that is, Michael Wagner and John Wagner, and Christian Wagner and Roether's children, and Catherine Schreiner's 3 children, and the money shall be put on interest till they come of age. Farther what I yet have with Christian, that is, 1 cow, 1 house clock, bed and bedsteads, clothes press, table, copper kettle, Bible, of these Eve Sherman shall have share too like the rest. So much from me. MICHAEL WAGNER.

May 4th, 1795."

A citation was ordered and issued for the representatives of the deceased, &c. Proof was made of the hand-writing of Michael Wagner, (deceased,) and that he was, in the year 1795, of sound disposing mind, memory and understanding. It was also proved that he lived with Christian Wagner in Liberty-Town, and went to Ken-

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(a) See *Wareham vs. Sellers*, 9 G. & J. 98; *Visitors vs. Bruce*, 1 H. & McH. 288, note.

tucky in the spring, about the 7th or 8th of May, 1795, and to Christian Wagner's after harvest in the same year, at his return that he was well; that he continued so for four after that he lay sick three weeks, when he died. The Court decreed that the paper should be recorded as the Michael Wagner, deceased. From this decree this was brought by Christian Wagner, who (among others,) had moned, but who alone appeared to and contested the proc

The cause was argued before CHASE, Ch. J. BUCH. NICHOLSON, JJ.

**347** \* *Taney* for the appellant, contended that the paper was to take effect as a will if the writer did not return, as he did return, it can have no effect. A will to take contingency, has none if the contingency does not happen vs. *Lanoe*, 1 Ves. 190; *S. C. Amb.* 557; *Lugg vs. Lugg*, 2 S. C. 1 *Ld. Raym* 441.

*Shaafl*, for the appellee, contended, that it did not appear appellant had any interest in or right under the will to contesting its being admitted to record, and appealing to from the decision of the Orphans' Court. He admitted Orphans' Court were wrong in their decision. *Decree*

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#### HAY et al. vs. CONNER.

Where a mother, as the natural guardian of her infant children under the age of 14 years, hired a slave belonging to the captain, to perform a voyage on wages, the slave to be returned and the vessel being sold at the port to which she sailed, by the slave was put by the captain on board of another vessel and furnished with provisions for the voyage, but never returned. In an action of trover by the children, prosecuting by the *amy*, against the captain, for the value of the slave—*He* action was well brought. (a)

APPEAL from Baltimore County Court. The appellant next friend, brought an action of trover in that Court : appellee, for the conversion of a mulatto male slave called Perry. The general issue was pleaded. The facts are stated following opinion of the County Court, delivered at the February, 1802, by

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(a) Affirmed in *Baltimore vs. Norman*, 4 Md. 359, where it was held that an infant may sue in trover by *prochein ami*, though he has a duly appointed guardian, and that, for the purpose of maintaining the right of possession is common to both the guardian and the



H. RIDGELY, Ch. J. In this case the evidence offered to the jury is, that John Hay, deceased, father of the plaintiff, in his life-time executed a bill of sale to the plaintiffs, who were and still are infants under the age of twenty-one years, by which he sold to them a negro slave by the name of James Perry, (who is the slave mentioned in the declaration;) that John Hay departed this life intestate, leaving his said infant children in the care and under the protection of their mother, Martha Hay; that Martha Hay afterwards took upon herself to hire for wages the negro slave, James Perry, to the defendant, Captain Conner, to perform a voyage from Baltimore to Hamburg, and thence back to Baltimore, as a cook on board the ship Mary, which the defendant commanded in the voyage. The slave's name was signed under the ship's articles, in pursuance of the said hiring, as a cook; and that the defendant promised Martha Hay that he would bring back the \* negro, or pay her a generous price for him, in case he should not. The ship Mary on **348** her arrival at Hamburg, in the prosecution of her voyage, was sold by the orders of her owner. The negro slave was, after the sale of the ship, put by the defendant on board the ship Fidelity, Captain Weems, bound to Baltimore, and the defendant furnished him with provisions for said voyage. It is admitted that the plaintiffs, at the time of the hiring of the slave by their mother, were the legal and sole proprietors of the said slave, and that the mother of the plaintiffs was not appointed the guardian of the plaintiffs, or either of them, by their father, or by the Orphans' Court, and that they, at the time of the hiring, were under the age of fourteen. It is also admitted, that an action of assumpsit has been instituted in this Court, and a recovery had for the slave's wages for said voyage, against the defendant, by Martha Hay; and now the present action is brought to recover the value of the slave, upon the ground that this slave has been converted by the defendant to his own use. The great question then, upon which this case depends is, whether under a view of these circumstances the defendant is guilty of a conversion. If he is, the plaintiffs are entitled to a verdict; if he is not, the verdict ought to be for the defendant.

It remains to be considered how this slave came on board the defendant's ship, by what authority he was shipped, and in what capacity he was received by the defendant? He was shipped by Martha Hay, at and for the wages of 20 dollars per month, for the voyage. He was received by the defendant at and for these wages to perform the voyage. Who was the contract between? The defendant on the one part, and Martha Hay on the other—The slave was no party to the contract. It is a mutual contract binding both the parties; on the part of Martha Hay, that the slave should perform the voyage; on the part of the defendant, that he would pay the wages. This I take to be the substance of the contract. Then, had Martha Hay power to make this contract? It results, from the

relation in which she stands to the plaintiffs, that she has her guardian by nature; as guardian by nature, she has the care of the persons of her children, and the management of the property, and she is accountable to them for the profits.

**349** then that she has a right, and \* is bound to use that right in such a way as to make it most productive; but she cannot vest the right of property in any other person, or change the management of property, that being in her children, from whom that right cannot be taken without their consent, and they are not capable of giving that consent until they arrive at the age of twenty-one. I say the contract is valid and binding on the parties; each has the mind and a legal capacity to make it. What legal obligations are imposed on Martha Hay by this contract? I take it she is bound to be able that her slave shall conduct himself, as other seamen, at similar stations on board a ship; on the other hand, the defendant is bound by the contract to conduct towards the slave in a proper manner, in every respect, as to other seamen, and if he does not, ship, Mrs. Hay is liable to all such losses as would result from the conduct of a mariner who should, under the same circumstances, desert. I mention the contract thus particularly, and its legal operation on both the parties, to show that this slave was shipped or hired by a person having proper authority, and that the defendant did no wrong. He was justified in receiving and employing him in the manner he did, and so far was not guilty of a tort. Is there any thing in the defendant's conduct afterwards that can make him guilty of a tort? Can he a right to send the slave back in another vessel? If he had refused to send the other seamen back by another vessel, he had no fault to find. To send the slave back in the same way. The Act of Congress says it is thought it a reasonable way, and it is a good rule for us. I say I will pay him the two months wages? It is right and proper he should have paid them; if he had he would have been bound to pay them again to Mrs. Hay, with whom the contract was made. Perjury is a crime, and a slave, and could do no act, but such as Mrs. Hay authorized him to do. The defendant put the slave on board Captain Ween's ship for Baltimore, to be brought back; by the act of God the ship was driven out of her course, and compelled to go to one of the islands. This was no wrong by the defendant. But when there, Perry was guilty of his escape. Is this the wrong of the defendant? We take it not. Suppose Perry had ran from the ship, and drowned himself, would the defendant be answerable? Would it be a conversion? No. Suppose he had, when compelled to go to this island, committed an offence against the laws \* of the State, and was imprisoned, would the defendant be answerable? No. Suppose he had taken a knife and cut his own throat, would it be said the defendant ought to have been standing always by to arrest him, and that he, having neglected to do this, is answerable? No. On the whole, we think that Martha Hay had a right to hire,

there was no wrong in the defendant in receiving the slave on board as a seaman; that the defendant did all he was bound to do afterwards to ensure the return of the slave, and if he deserted, it was not the defendant's fault; and therefore, it is the opinion of the Court, that the defendant is not guilty of a conversion upon the facts so offered and admitted to be proved to the jury. The plaintiffs excepted; and the verdict and judgment being for the defendant, the plaintiffs appealed to this Court.

The cause was argued before CHASE, Ch. J. BUCHANAN and NICHOLSON, JJ.

*Brice*, for the appellants, stated, that the principal questions were—1. Whether Mrs. Hay, the mother, was guardian by nature, if so, whether as such she has any such power over the property of the children? And 2. Admitting she had such power, whether the defendant has not, by putting the slave in custody of another person without the knowledge or consent of Mrs. Hay, or her children, exercised such an act of ownership over the slave as to amount to a conversion? As to the first question, he cited *Fonbl.* 247; *Co. Litt.* 119 b, (note B); *Brown's Civil Law*, 131; and the Act of 1798, ch. 101.

*Purviance* and *S. Chase, Jr.* for the appellee.

THE COURT said, the action of trover was well brought, and reversed the judgment.

*Judgment reversed, and procedendo awarded.*

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#### FAGET vs. BRAYTON.

If the declaration in an action of replevin does not allege damage to have been sustained, it is fatal. (a)

Where the declaration in replevin stated the taking of the property to be in Gay street, from the dwelling-house of the plaintiff—*Held*, that evidence of the defendant's having taken the property in Gay street, was sufficient without proving that he took it from the dwelling-house of the plaintiff.

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(a) When a breach of contract is relied on, from which damages necessarily arise the general conclusion, that the plaintiff has sustained damage in, &c. is sufficient to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them. *Howard vs. R. R. Co.* 1 Gill, §11. Where a declaration averred that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of his goods, (specifying them,) "and the plaintiff claims a return of said goods, or their value, and \$1,500 for their detention;" and there was a verdict for the plaintiff for \$475 damages, it was held, on motion in arrest, that this declaration is in the nature either of trover or detinue, and the judg-



APPEAL from Baltimore County Court. Replevin for a declaration did not allege any damage to have \*  
**351** tained by the plaintiff, (now appellee.) At the defendant, (the appellant,) prayed the Court to direct the as the plaintiff had declared the taking of the cow in ( have been in Gay Street, from the dwelling-house of the was incumbent on him, in order to entitle him to recover to prove that the taking was in Gay Street, but to prove from the house of the plaintiff in that street. The RIDGELY, Ch. J.) refused to give this direction, but did jury that if they should be of opinion that the defendant cow of the plaintiff in Gay Street, that was sufficient to plaintiff to recover. The defendant excepted; and the v judgment being against him, he appealed to this Court.

*Purviance*, for the appellant.

*Martin, Winder and Rogers*, for the appellee.

THE COURT concurred with the County Court in t expressed in the bill of exceptions; but reversed the because no damages were laid in the declaration.

*Judgment*

#### HOGMIRE *et al.* vs. M'COY.

In an action of trespass *q. c. f.* the plaintiff offered to prove the possession of the land on which the trespass was alleged to committed, and that the defendant committed the trespass of on the land so in possession of the plaintiff, at the p located on the plots in the cause—*Held*, that such evidence missible.

The plaintiff proved by a witness that he was present when which the trespass was alleged to have been committed, w located or taken up, and that it was then located, as it no plots,—*Held*, that the evidence was admissible to prove beginning and location of the tract of land.

APPEAL from Washington County Court. The appellant an action of *trespass q. c. f.* against the appellee. The ge was pleaded, and plots were returned.

1. At the trial the plaintiffs offered to prove, by a com ness, that they were in possession of the tract of land c Timber, mentioned in the declaration, and on which t

ment must be arrested; if in trover because no damages are injury complained of, the damages claimed being for the deten for the conversion of the goods; if in detinue, because the ver ascertain their value. *Stirling vs. Garitee*, 18 Md. 468.

was alleged to have been committed, as located on the plots by the plaintiffs; and that the defendant committed the trespass mentioned in the declaration, on the land so in possession of the plaintiffs, at the place located by them on the plots. This testimony the County Court, (CLAGETT, Ch. J.) refused to admit to be given to the jury. The plaintiffs excepted.

2. The plaintiffs also offered to prove, by a competent witness, that he, the witness, was present when the tract of land called Long Timber was originally located or taken up, and that the tract was then located, as now located \* by the plaintiffs on the plots, and then prayed the Court to direct the jury, that this testimony was admissible to prove the original beginning and location of the land, in order to support the plaintiffs' action. But the County Court refused to admit the testimony. The plaintiffs excepted; and the verdict and judgment being against them, they prosecuted this appeal.

*Hughes*, for the appellants.

*T. Buchanan, Brooke and Lawrence*, for the appellee.

THE COURT dissented from the opinions expressed by the County Court in both of the bills of exceptions. *Judgment reversed.*

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#### CUSHMAN vs. SIM'S Adm'r.

In *assumpsit* for one year's services as an overseer, and a *quantum meruit* for the same services—*He/d*, that if there was a special agreement between the plaintiff and defendant for the plaintiff's services as an overseer, the plaintiff could not recover upon his declaration. (a)

APPEAL from Frederick County Court. This was an action of *assumpsit*, and the declaration contained two counts—The first for one year's service by the plaintiff, (now appellant,) as an overseer, in the year 1791, rendered the intestate of the defendant, (the appellee,) and the other a *quantum meruit* for serving the intestate as an overseer for one year. The general issue was pleaded; and at the trial the plaintiff offered in evidence, that he had acted as overseer for the intestate during the year 1791, and proved the value of such services. The defendant then gave in evidence, on cross-examination of the plaintiff's witness, the declaration of the plaintiff, that he was to receive of the intestate a share of the crop made on the land for his services in that year, and that the plaintiff had received his share of the corn crop; but the defendant offered no evidence of a further agreement, nor of what share or proportion of the crop the plaintiff was to receive, or that the defendant had performed

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(a) See *Hannan vs. Lee*, 1 H. & J. 85, note (a).

his part of such special agreement. The defendant told the Court to direct the jury, that if they were of opinion evidence, that there was any special agreement between plaintiff and the defendant's intestate, for his services as an overseer, the year 1791, the plaintiff was not entitled to recover on that count in this cause; which opinion and direction the Court, (Ch. J.) gave. The plaintiff excepted; and \* the verdict being against him, he appealed to this Court.

The cause was argued before CHASE, Ch. J. BUCHANAN, JJ.

*Taney*, for the appellant, cited *Payne et al. vs. Bacomb*, 2 H. & J. 131. *Shaaff*, for the appellee, cited *Esp.* 138, and *Hannan vs. J.* 131.

THE COURT said, that in the case of *Payne et al. vs. Bacomb*, there was a count on a special agreement, and other counts on which no agreement was proved, the plaintiff was permitted to recover on the other counts.

*Judgment*

#### RUTTER vs. BLAKE.

If the seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and afterwards appear to be different, the purchaser may return the goods and recover back the money, in an action for money had and received. If he may have his action without a return of the goods, if he returns them to the seller where they are deposited. (a)

If A. sells a horse to B. affirming him to be sound—B. receives him and sets out on a journey, but finds the horse to be unsound. If he returns him on the road, he may recover back the money paid, in an action for money had and received, if he gives notice to A. where the horse is, that he is not bound to return the horse.

But if B. gives no notice to A. but sends the horse to vendue, and for half what he gave, B. has elected to abide by his contract and cannot resort to A. to make good the difference of price.

(a) In *Horn vs. Buck*, 48 Md. 372, the Court said: "It has been held in Maryland, that for a breach of warranty of soundness, a purchaser has his election, in a reasonable time, to rescind the contract, return the goods, or offer to return it, and recover back the purchase money. See *Blake*, 2 H. & J. 353; *Franklin vs. Long*, 7 G. & J. 407. But it is the modern doctrine established both in England and elsewhere in that when the contract of sale has been executed, and the title has passed to the purchaser by delivery and acceptance, where there is no fraud or agreement to return, he is not entitled to rescind and return the goods for breach of warranty, but his remedy in such case is by suit for damages. Cf. *Miller vs. Grove*, 18 Md. 242; *McCeney vs. Duvall*, 27 Md. 211.

APPEAL from Baltimore County Court. The appellee brought an action of assumpsit against the appellant, on a promissory note, drawn on the 4th of July, 1800, by him and Edward Rutter, deceased, whom he survived, for \$1,012.50, payable sixty days after date to Edward Johnson, or order, and by him endorsed to William MacCreery, or order, and by him endorsed to the appellee. The general issue was pleaded; and at the trial, the plaintiff produced and read the note in evidence. The defendant then offered in evidence an agreement made between him and the plaintiff, viz. That the promissory note, declared on in this case, was given for goods purchased by the defendant, and E. Rutter, (since deceased,) of the plaintiff. That the defendant, in the trial of this cause, may inquire into and offer evidence of the consideration of the note, and avail himself of the want of consideration for the whole, or any part of the note, as fully as the defendant might legally do, if the note had been originally given by T. & E. Rutter to the plaintiff, and the plaintiff had brought his action as payee of the note against the defendant. The defendant further offered evidence to prove, that he and E. Rutter, on the 1st of March, 1800, at Baltimore  
 \* County, purchased three bales of blue Guerrahs, and that **354**  
 the note, with the indorsements, was given by T. & E. Rutter to the plaintiff, to secure the payment of the purchase money of these goods. That E. Rutter, since the execution of the note, died; and that T. & E. Rutter did not, at the time of the sale, or at any time previous to the arrival of the goods in the West Indies, as hereafter stated, examine the goods. That T. & E. Rutter shipped the goods to the Island of Currocoa, in the West Indies, and there sold them on the 2d of April, 1800, for and on their account. That the three bales of goods were not blue Guerrahs, but goods of a different and inferior quality. That T. & E. Rutter had sustained damage and loss, by reason of the false representation and warranty made by the plaintiff, in the sale of the goods. The plaintiff then prayed the Court to direct the jury, that if they should be of opinion, that the defendant and E. Rutter did receive and make sale of the goods in Currocoa, on their own account, and for their own use, the defendant is not in law entitled to any deduction for any loss or damage sustained by the defendant and E. Rutter, in consequence of any warranty of the goods by the plaintiff. The County Court, (H. RIDGELY, Ch. J.) delivered the following opinion: Generally, in the sale of goods, if the seller affirms them to be of a particular quality, and the buyer receives them upon the credit of this affirmation, and they afterwards appear to be different from what they were affirmed to be, the purchaser may return the goods, and recover back the money, in an action for money had and received, or he may even have his action without a return of the goods, if he give notice to the seller where they are deposited. As, where A. sells a horse to B. affirming him to be sound, B. receives the horse, and sets out



on a journey, but finds the horse to be unsound, and leaves him on the road, he may recover back the money he paid for him, in an action for money had and received, if he gives notice to the seller where the horse is, and he is not bound to return the horse. It was the conduct of the seller that was the original cause of the horse being at a distance and out of his possession, and he must put up with the loss and inconvenience. So if a merchant in Baltimore buys goods, the seller warranting them to be of a particular description of quality, and the merchant, without \* examining, sends them **355** to the West Indies, where upon opening he finds them not to be of the quality warranted, he may store them, give notice to the seller, and recover back the money paid for them, in an action for money had and received; or he may bring his action on the special agreement of warranty, and recover damages for the full amount of the injury he has sustained, nor is he obliged to return the goods, or put himself to any further expense or trouble about them. This, I take it, was exactly the defendant's situation when the goods arrived in the West Indies. He had his option to do one of two things: first, to refuse to keep the goods, declining to go on with the purchase; or secondly, to accept the goods in lieu of those sold him, and to confirm the purchase by going on to sell them, and receiving the amount of sales. What does he do? Why he adopts the latter of the two alternatives—He sells the goods, and receives the money—not as agent for the seller, that is not intended, but upon his own account. This mode of proceeding by the defendant, however hard it bears upon him, I am of opinion, has deprived him of a remedy here upon the warranty. Let us suppose A. to sell a horse to B. with warranty that he is sound. B. receives the horse, and riding him home discovers him to be unsound, and says nothing of this to A. but sends the horse to vendue, and sells him for half what he gave for him. Here he has elected to abide by his contract, and I take it he can never resort to the original seller to make good the difference of price. I think the cases I have put are similar to the case before the Court, and that the warranty, if any made, cannot avail the defendant so as to entitle him to a deduction of the warranty for any damage or loss by him sustained. Suppose the plaintiff had received the goods on sale, with warranty to him, and has paid the amount—if he does not recover of the defendant, neither can he recover of the person who sold them to him; the defendant has put it out of the plaintiff's power; for the defendant, having sold the goods, the plaintiff cannot return them, or give notice to the person who sold them to him where they are. Therefore it may be that the plaintiff paid the price of first quality goods; and if he should not be permitted to recover against the defendant, he will lose the difference of price between goods of the best and goods of inferior quality. Whereas, \* had the goods not **356** been disposed of by the defendant, the plaintiff could have



returned or given notice where the goods were stored, and recovered over from the person who sold to him. It is true, that if at the time of making this note any particular agreement or understanding took place between the plaintiff, or his agent MacCreery, and the defendant that a deduction should be made on account of any defect in the goods, that the defendant has his remedy in equity by making them parties, or in this Court, if he can prove the note was delivered with such intention or understanding of the parties. The defendant excepted, and the verdict and judgment being against him, he brought this appeal.

The case was submitted to the Court without argument.

*W. Dorsey*, for the appellant.

*Purviance* and *S. Chase, Jr.* for the appellee. *Judgment affirmed.*

### DRURY & BENNETT vs. NEGRO GRACE.

Where the limitation over is in fee after an indefinite failure of issue, it is not good as an executory devise, because of its tendency to create a perpetuity by rendering property unalienable. (a)

In expounding wills, the first and great principle to be observed is, that the intention of the testator is to prevail, unless such intention is opposed by some rule of law.

Z. W. by his will, devised as follows: "I devise the whole of my property, real and personal, to my beloved daughter M. W. to her and her heirs forever; and in case she dies without lawful issue, then the whole of my said property is to be possessed by my dear wife A. during her widowhood, and no longer; and at her death or marriage, to be sold at public sale, and the money arising therefrom to be equally divided between H. C. and N." M. W. obtained possession of the property so devised to her, and died in the 17th year of her age, unmarried, and without having any issue, having by her will manumitted all her slaves. A. the widow of the testator, is now living, having in the life-time of M. W. married one R. B. Negro Grace, one of the slaves manumitted by M. W. petitioned for her freedom against H. C. and N.—*Held*, that the limitation over in the will to A.: during her widowhood, constituted a good executory devise, because it was to take effect on the contingency of M. W. dying without leaving issue at the time of her death, and that the petitioner is not entitled to her freedom.

APPEAL from Anne Arundel County Court. In this case the appellee petitioned for her freedom, and the following case was stated for the opinion of the County Court. Zebedee Wood, being possessed of sundry negro slaves, and among others of the petitioner, on the 10th of February, 1788, duly made his last will and testament, containing this clause—"I devise and bequeath the whole of my property, real and personal, to my beloved daughter Mary Ann

(a) See *Chevr vs. Weems*, 1 H. & McH. 265, note (a).

Wood, to her and her heirs for ever, and in case she dies without lawful issue, then the whole of my said property is to be possessed by my dear wife Ann, during her widowhood, and no longer, and at her death or marriage to be sold at public sale, and five hundred pounds current money, out of the money arising therefrom, to be **357** \* paid by my executor to my nephew James Cummins, or to his heirs, (if any,) and the balance thereof equally divided between my brother Hopewell, and sisters Cassandra and Ann," &c. The testator died on or about the 3rd of April, 1788, without having revoked, or in any manner changed his will. Samuel Harrison, the executor named in the will, renounced the same, and letters of administration were granted to Drury, one of the defendants. After the death of the testator, Mary Ann Wood his daughter and legatee, obtained possession of the negro slaves; and being so possessed of them and entitled to them, on the 9th of October, 1800, duly made her last will and testament in writing, in which, among other things, is as follows: "My will and desire is, that all my negroes shall be free." The testatrix died on the 7th of January, 1801, in the seventeenth year of her age, unmarried; and without having any issue of her body, and also without revoking or in any manner changing her will. After the death of Zebedee Wood, Ann his widow intermarried with one Richard Brown, before the death of Mary Ann Wood, and survived Mary Ann Wood, and is now in full life, and has received her thirds of the personal estate of Zebedee Wood. Hopewell and Cassandra Wood, the brother and sister of Zebedee Wood, and legatees named in his will, survived Mary Ann Wood, and are now alive, and Ann, the sister and legatee of Zebedee, died before Mary Ann Wood, leaving issue still living. The defendants have obtained possession of the petitioner, and have acquired and are invested with all the right, title and estate, that Hopewell, Cassandra and Ann, had in the petitioner, and are to be considered in the same light that Hopewell, Cassandra and Ann would, were they the defendants in this cause. On this statement, the County Court gave judgment for the petitioner, and the defendants brought this appeal.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, JJ.

**358** *T. Buchanan*, for the appellant, \* cited 2 *Blk. Com.* 173; 2 *Fearne's Ex. Dev.* 1, 73; *Nichols vs. Hooper*, 1 *P. Wms.* 199; *Target vs. Gaunt*, *Ibid.* 432; *Hughes vs. Sayer*, *Ibid.* 534; *Pinbury vs. Elkin*, *Ibid.* 564; *Forth vs. Chapman*, *Ibid.* 663; *Atkinson vs. Hutchinson*, 3 *P. Wms.* 258; *Lampley vs. Blower*, 3 *Atk.* 396; *Keily vs. Fowler*, 6 *Bro. P. C.* 309; *Goodtittle vs. Pegden*, 2 *T. R.* 720; *Wilkinson vs. South*, 7 *T. R.* 551; *Roe vs. Jeffery*, *Ibid.* 585; *Fearne's Ex.*

*Dev.* 279, (376; ) *Doe vs. Lyde*, 1 *T. R.* 598; and *Trafford vs. Boehm*, 3 *Atk.* 449.

*Johnson*, (Attorney-General,) for the appellee, contended that a devise over, after a failure of issue generally, without restrictive words, was not an executory devise; and that there was no executory devise in this case to Ann, the wife of the testator. *Love vs. Wyndham*, 1 *Lev.* 290; *Pearse vs. Reeves*, *Pollex.* 29; *Earl of Strafford*, vs. *Buckley*, 2 *Ves.* 181; *Badger vs. Lloyd*, 1 *Ld. Raym.* 523; *Beauclerk vs. Dormer*, 2 *Atk.* 308, 312; *Saltern vs. Saltern*, *Ibid.*, 376; *Sheffield vs. Lord Orrery*, 3 *Atk.* 287; *Lanesborough vs. Fox*, *Ca. temp. Talb.* 262; *Fearne*, 322, 325, 341, 159; 2 *Bac. Ab.* 76, 77; and *Davidge vs. Chaney*, 4 *H. & McH.* 393.

CHASE, Ch. J. delivered the opinion of the Court. The question to be decided by the Court in this case, arises under the will of Zebedee Wood; what estate did Ann Wood, the widow of Zebedee Wood, take under the will?

It is a principle generally recognized by the Courts of law and equity, and the Court think well established, that where the limitation over is in fee, after an indefinite failure of issue, it is not good as an executory devise, because of its tendency to create a perpetuity by rendering property unalienable. In this case the limitation over is to Ann Wood, during her widowhood, and at her death or marriage to be sold, &c. It is stated that Ann, the widow, married during the life of Mary Ann Wood, the first devisee, and is now living.

In expounding wills, the first and great principle to be observed is, that the intention of the testator is to prevail unless such intention is opposed by some rule of law. The only rule of law which is supposed to stand in the way in this case, is that which restrains the testator from limiting \* his estate in such manner as to create a perpetuity; and if that is no obstacle in this case, there is **359** nothing to prevent the testator's intention from being effectuated.

The limitation over to Ann, during her widowhood, plainly evinces an intention in the testator that she should be benefited by the devise to her, which could not be the case if her interest could not vest until the unrestricted failure of issue of Mary Ann, during the widowhood of Ann—a mere possibility, and too remote to be in the contemplation of the testator.

The limitation over to Ann, during her widowhood, constitutes a good executory devise, because it was to take effect on the contingency of Mary Ann dying without leaving issue at the time of her death.

The only consequence which can result from Ann's marrying in the life-time of Mary Ann, is that the remainder over, after the death or marriage of Ann, did take effect immediately on the death of Mary Ann, and such event did not change or alter the quality or nature of

the estate created by the first limitation over to Ann, nor did it defeat the remainder over.

The Court are of opinion, that the judgment of the County Court be reversed. *Judgment reversed.*

### SHORTER vs. BOSWELL.

In a petition for freedom, the following part of the deposition of a witness was held to be competent evidence—"and always understood she, (the ancestor of the petitioner) came from R. N. but did not know it of his own knowledge, and heard that she went by the name of P. S." As also this part of the deposition of another witness, "That his mother, in her life-time, told him it was generally reported, and she always understood, that a woman named P. S. came to the family of J. L. from the family of R. N." (a)

A record book of Charles County Court, containing the certificate and affidavit of a priest in 1702, that he had, in 1681, in Saint Mary's County, married a negro man named L. R. to a white woman named E. S. both servants of W. R. an affidavit of a person who was present at the marriage, proving the same, as also the issue by the marriage, and an entry from the parish register of the latter county, stating that the above were therein recorded in 1702, and the whole recorded in the above record book in 1703, the entry thereof in the record book, (here being proof of the loss of the originals and of the parish register) was offered in evidence, in a petition for freedom, by a person claiming as a descendant from E. S. to prove the existence of a free white woman named E. S. in the family of W. R. her marriage, and the issue by that marriage, and was held to be admissible evidence. (b)

**APPEAL** from Charles County Court. The appellant exhibited to that Court her petition for freedom against the appellee.

1. At the trial the petitioner offered to read in evidence to the jury, the deposition of Mary Lancaster, taken by consent of the parties, on the 24th of August, 1803; wherein, to the first interrogatory propounded to the witness, viz: "Did you know Martha, or Patt, who formerly belonged to Captain John Lancaster, and from whom did he get Patt?" she answered "that she knew Patt, and always \* understood she came from Raphael Neale, but did not know  
**360** it of her own knowledge, and heard that she went by the name of Patt Shorter." The defendant objected to the words "and always understood that she came from Raphael Neale, but did not know it of her own knowledge, and heard that she went by the name of Patt Shorter," as not being competent evidence, and the County Court sustained the objection, and refused to let that part of the deposition be read to the jury. The petitioner excepted.

(a) See *Mahoney vs. Ashton*, 4 H. & McH. 193; *Mima Queen vs. Hepburn*, 7 Cranch, 290.

(b) See *Shorter vs. Rozier*, 3 H. & McH. 153.

2. The petitioner then offered and gave in evidence, by Thomas Lancaster, that his mother, Mary Lancaster, was dead. And also offered to prove by the same witness, "that his mother, in her lifetime, told him that it was generally reported, and she always understood, that a woman named Patt, or Martha, came to the family of John Lancaster from the family of Raphael Neale, of Saint Mary's County." But the defendant objected to it, as incompetent and inadmissible evidence; and the County Court were of opinion that the same was not competent or admissible evidence, and refused to let it go to the jury. The petitioner excepted.

3. The petitioner then offered and gave in evidence, that she was the daughter of a woman named Betty, who was the daughter of a woman named Sarah, who was the daughter of a woman named Betty, who was the daughter of a woman named Martha, or Patt, who was held in servitude by John Lancaster, of Charles County, and that Patt was called Patt Shorter, and had two sisters, namely Mary, who belonged to Edward Neale, and Jane, who belonged to Roswell Neale, and that Edward and Roswell Neale were the sons of Anthony Neale, of Saint Mary's County, who died about the year 1723. The petitioner also gave in evidence, that John Lancaster married Elizabeth, the daughter of Raphael Neale, who was also the son of Anthony Neale, and that Martha, or Patt, was given to John Lancaster by Raphael Neale; that John Lancaster gave Sarah, above named, to Henry Digges, of Charles County, deceased, who intermarried with Henrietta, the daughter of John Lancaster; that Digges sold Betty, the daughter of Sarah, to the defendant, Boswell; and that the petitioner was born of Betty, after the sale of her mother to the defendant. The petitioner then produced one of the record books of Charles County Court, and offered to read in evidence \* an entry made in the said record, in folios 225 and 226, 361 to prove the existence of a free white woman named Elizabeth Shorter, in the family of a certain William Roswell, of Saint Mary's County, and that she married a black man named Little Robin, the servant of Roswell, and had by him three daughters, namely Mary, Jane and Martha, and that Elizabeth Shorter, and her husband, were given by Roswell to Anthony Neale, and that Neale married the daughter of Roswell. The entry was as follows:

"At the request of Mr. Anthony Neale, the following certificate and deposition were recorded: Maryland, *ss.* Saint Mary's County. These are to certify, that in the year 1681, or near about that time, I, Nicholas Geulick, Priest, the subscriber hereof, did join together in the holy estate of matrimony, according to the then law, a negro man named, to the best of my remembrance, Little Robin, to a white woman, whose name was Elizabeth Shorter, which couple all that time were both servants unto Mr. William Roswell, deceased, and was after, as I am informed, disposed of by the said Roswell unto

Mr. Anthony Neale, of Charles Connty. Certified under my hand, this 15th day of June, *Anno* 1702. "NICHOLAS GEULICK."

"Memorandum.—The day and year above, came before me, Mr. Geulick, and made oath upon the Holy Evangelist, that the above affidavit is the whole truth and nothing but the truth.

"*Jurat coram me*, JOSHUA GUIBERT."

"Maryland, ss. St. Mary's County. Emma Roswell, widow, aged seventy years, or thereabouts, being sworn upon the Holy Evangelist, declareth upon her oath, that she the said deponent, was present at the marriage of the above said couple, and that the ceremony was performed by the above said Mr. Nicholas Geulick, Priest, and that the negro man's name was Little Robin, and the white woman's name Elizabeth Shorter; and that they were, at the time of their being married, both servants unto this deponent's husband, William Roswell, deceased, and by him given and made over and delivered up unto Anthony Neale, upon marriage of the said Neale with Elizabeth, the daughter of said Roswell, and have remained \* in  
**362** the said Neale's service ever since; and that after the marriage of the said negro man and white woman, the said white woman had three mulatto girl children, named Mary, Jane and Martha, who are now living to the best of this deponent's knowledge.

"This 15th day of June, *Anno* 1702. *Jurat coram me*.

"JOSHUA GUIBERT."

Maryland, St. Mary's County, ss. (King and Queen Parish,) June 6, 1702. Then recorded upon the record book of the above said parish, the two within affidavits, one of Mr. Nicholas Geulick, Priest, and the other of Mrs. Emma Roswell. This being a true copy as now given under my hand the day and date above, by me,

"WM. HAVETT, Clk. Vestry."

"Entered on the records of Charles County, June the 25th, 1703." [See 3 H. & McH. 239.]

The petitioner further gave evidence, that the paper in the record mentioned to be recorded, was not to be found among the papers remaining in the clerk's office of the county; and that the parish registers of King and Queen Parish, in Saint Mary's County, prior to the year 1744, have been lost or destroyed. The defendant objected to the admissibility of the entry on the record, as evidence; and the County Court sustained the objection. The petitioner excepted. There was a verdict and judgment for the defendant; and the petitioner appealed to this Court.

The cause was argued before CHASE, Ch, J. BUCHANAN, and NICHOLSON, JJ. by

*T. Buchanan*, for the appellant; and by

*Chapman*, for the appellee.

THE COURT dissented from the opinions expressed by the Court below, in all of the bills of exceptions.

*Judgment reversed and procedendo awarded.*

\* SHEELY vs. BIGGS.

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- 1 In an action of slander, the words charged to have been spoken were, that  
 • "he the said J. swore false, and swore to a lie"—*innuendo*, "meaning that the said J. had committed perjury; that the said J. had taken a false oath before a magistrate"—*Held* not to be actionable.

No words are actionable unless they impute a crime to the plaintiff which subjects him to punishment. (a)

The office of the *innuendo* is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; but if the words in themselves are not actionable, their meaning cannot be extended by the *innuendo* to make them actionable. (b)

If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part, to show they were spoken in a criminal sense, or they are not actionable.

To make the word forsworn, slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding, in which the party was sworn.

APPEAL from Frederick County Court. It was an action of slander, and the declaration stated, that the plaintiff, (now the appellee,) was a good, true, honest, and faithful citizen, and had always lived free and wholly unsuspected of and from all manner of perjury, &c. yet the defendant, (the appellant,) maliciously intending to injure the plaintiff in his good name, and to bring him into public scandal, ignominy and disgrace, and to subject him to the pains and penalties, by the laws and statutes of this State, made and provided against those who are guilty of false swearing, on, &c. spoke and published of and concerning the plaintiff these false, scandalous, and malicious words, viz. "He (meaning the plaintiff,) swore false, and swore to a lie," (meaning that the plaintiff had committed perjury, that he had taken a false oath before a magistrate.) The second count charged the defendant with uttering these words, to other citizens, of the plaintiff: "He (meaning the plaintiff,) had sworn false, and would, if he did not take care, lose his ears for it," (meaning that the plaintiff committed perjury before a magistrate.) The general issue was pleaded, and the plaintiff obtained a general verdict for £22 17 6 current money. The defendant moved in arrest of judgment, and assigned the following reasons: 1. Because the words charged in the first count of the declaration are not actionable. 2. Because the words charged in the second count are not

(a) See 1 Poe's Pldg. 114-120.

(b) Affirmed in *Dorsey vs. Whipps*, 8 Gill. 468.

actionable. 3. Because the words charged in the different counts of the declaration, and alleged to have been spoken by the defendant, are not so laid and set forth in the said counts, as to entitle the plaintiff to maintain his action. 4. Because there is no *colloquium* set forth in the declaration, showing the words were spoken in reference to a judicial proceeding, or to what the words spoken referred. The County Court overruled the motion, and rendered judgment on the verdict for the plaintiff. From that judgment this appeal was brought.

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, and GANTT, JJ.

*Taney* and *F. S. Key*, for the appellant, cited *Holt vs. Scholefield*, 6 T. R. 691.

*Shaaff*, *contra*, cited 6 Bac. Abr. tit. Slander, (B. 3,) and *Gruneth vs. Derry*, 3 Lev. 166.

**364** \* CHASE, Ch. J. delivered the opinion of the Court. There are some principles well established in actions of slander, which govern the Court in determining the case.

First.—No words are actionable unless they impute a crime to the plaintiff, which subjects him to punishment. 3 Blk. Com. 123; *Holt vs. Scholefield*, 6 T. R. 691, 694.

Secondly.—The office of the innuendo is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; and if the words in themselves are not actionable, their meaning cannot be extended by it to make them actionable. *Holt vs. Scholefield*, 6 T. R. 694.

Thirdly.—If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part, to show they were spoken in a criminal sense, or they are not actionable.

The word forsworn, although in one sense it may import perjury, yet it does not necessarily imply it; for a person may be forsworn without committing perjury; and no extrinsic aid can be derived from the innuendo to give the words a criminal meaning.

If the words before the innuendo do not import slander, no words produced by the innuendo will make the action maintainable. It is not the nature of an innuendo to beget an action. Forsworn by itself, does not import slander; otherwise of the word perjured. *Core vs. Morton*, Yelv. 27; *Holt vs. Scholefield*, 6 T. R. 694.

To make the word forsworn slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding in which he was sworn. *Core vs. Morton*, Yelv. 27.

The words in the declaration charged to have been spoken are, that "he, the said Jacob, swore false, and swore to a lie." The subsequent words, "meaning that the said Jacob had committed per-



jury, that the said Jacob had taken a false oath before a magistrate," are part of, and come under the innuendo.

The question is, whether these words are actionable? and it is admitted, if they are not, the judgment must be arrested, there being one defective count in the declaration—a general verdict and entire damages having been given.

The Court are of opinion they are not; and that the judgment of the County Court be reversed, and judgment on the verdict be arrested.

*Judgment reversed, &c.*

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\* WEEMS vs. STALLINGS.

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In an action of trover, brought by an employer against his overseer, to recover the value of a hhd. of tobacco made on the plantation of the plaintiff, and inspected in the name of the employer, and the note delivered to the overseer, to be by him delivered to his employer, but which was retained and sold by the overseer as his share of the crop of six hhds. under an agreement entered into between the parties, stipulating that the overseer should have one-sixth part of all tobacco made—*Held*, that the plaintiff was entitled to recover. (a)

APPEAL from Calvert County Court. This was an action of trover, brought by the appellant against the appellee, for one hogshead of crop tobacco, weighing 988 lbs. &c. to which the general issue was pleaded. At the trial, the plaintiff offered in evidence, that in the year 1802, the defendant carried to the inspection house at Lower Marlborough six hogsheads of tobacco, which grew on the farm of the plaintiff during the year 1802, while the defendant acted as the overseer of the plaintiff; three of which hogsheads were crop tobacco, one weighing, &c. three second, one weighing, &c. That the tobacco was inspected in the name of the plaintiff, and the notes delivered to the defendant, to be delivered by him to the plaintiff, but that the defendant delivered only five, and retained the one of the crop hogsheads weighing 988, and which he afterwards sold. The defendant then produced and read in evidence, an agreement in writing entered into between him and the plaintiff, the execution of which was admitted, dated the 9th of September, 1801, in which, among other things, it was agreed that the defendant was to serve the plaintiff as an overseer for the ensuing year 1802, and to receive therefor the sixth part of all tobacco, &c. made by him on the plaintiff's plantation, with the hands, &c. stated to found and furnished by the plaintiff. The defendant proved that the six hogsheads of tobacco, above mentioned, were made on the plantation of the plaintiff, while the defendant acted as overseer under the above articles of agreement. He then prayed the opinion of the Court, and their

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(a) Cf. *Hoskins vs. Rhodes*, 1 G. & J. 266.

direction to the jury, that if they should be of opinion, that the hogshead of tobacco sold by the defendant was part of the crop made on the plantation of the plaintiff during the year that the defendant acted as overseer under the above agreement, that the plaintiff is not entitled to recover in the present form of action. And the Court, (GANTT, Ch. J.) upon this prayer, instructed the jury, that if they should believe, from the evidence, that the tobacco was made upon the plantation of the plaintiff, during the year mentioned in the agreement, when the defendant was overseer, and that there had been no division of the tobacco so made, that the defendant had an undivided property in the tobacco so inspected by virtue of the agreement, and \* that the plaintiff could not recover **306** in this action. The plaintiff excepted; and the verdict, and judgment being against him, he brought this appeal.

The cause was argued before CHASE, Ch. J. BUCHANAN and NICHOLSON, JJ. by

Johnson, (Attorney-General,) and Magruder, for the appellant; and by

G. A. Olagett, for the appellee.

THE COURT was of opinion that the defendant below was only a hired person; that that character was not changed by his compensation being uncertain and depending on the amount of the profits; that he had no such interest in the crop as would justify him in disposing of it, and that having sold the tobacco in question, he was liable to the plaintiff below in this form of action.

*Judgment reversed, and procedendo awarded.*

#### G. & J. CHAPMAN vs. BRAUNER.

In an action of trespass *q. c. f.* on a tract of land called G. D. the defendant took defence for a tract of land called A. on a part of which the alleged trespass was committed—*Held*, that the plaintiff was only entitled to recover for a trespass committed within the lines of the tract called G. D. as the same was located by him on the plots in the cause, although he had been in the possession and cultivation of the land on which the trespass was alleged to be committed, claiming the same as part of G. D. for upwards of 50 years, and it had always been called and reputed as part of that tract.

APPEAL from Charles County Court. An action of *trespass quare clausum fregit*, was brought by the appellants against the appellee, for entering their close called Gryme's Ditch, &c. The pleas of *non cul.* and freehold in the defendant, as part of a close called Adventure, were pleaded. Issue was joined to the first plea, and a general replication put in to the second. The defendant demurred to the

replication, to which there was a joinder in demurrer. The County Court overruled the demurrer, and directed the defendant to answer over to the replication. A general rejoinder was pleaded, and issue joined. The lands were located on plots returned under a warrant of resurvey, issued for that purpose. At the trial the plaintiffs gave in evidence, that fifty-two years ago the fence, located on the plots, was set up by the proprietor of the land, located on the plots, and called The Adventure, and that the fence has been uniformly kept up. They further gave evidence, that between 50 and 60 years ago their father, Person Chapman, had possession of the tract of land located on the plots called Gryme's Ditch, and also of all that part of the tract called The Adventure, which lies on the west side of the fence; that P. Chapman, in his life-time, cultivated and \* cut wood on the land on the west side of the fence, and had full **.367** and uninterrupted possession of the same, claiming it as his land; that on the death of P. Chapman, the land descended to the plaintiffs, who have since cultivated and cut wood on the same, and held possession thereof until the trespass mentioned in the declaration was committed; and that all that part of The Adventure, which lies on the west side of the fence, has been called and reputed as part of Gryme's Ditch, and has been held and occupied by the plaintiffs, and their father, as part of that land. The plaintiffs then offered to prove, that the defendant had committed the trespass, alleged in the declaration, to the eastward of the black line as located on the plots from letter B to letter C, the second line of Gryme's Ditch, as located on the plots by the plaintiff, and on the west side of the fence. But the defendant objected to the admissibility of the evidence, and contended that the plaintiffs were not competent to give evidence of any trespass committed on that land; and the County Court, (GANTT, Ch. J.) was of opinion, and so directed the jury, that the plaintiffs were only entitled to recover for a trespass committed by the defendant within the lines of the tract called Gryme's Ditch, as the same is located on the plots by the plaintiffs. The plaintiffs excepted; and the verdict and judgment being against them, this appeal was brought.

The cause was argued before CHASE, Ch. J. BUCHANAN and NICHOLSON, JJ. by

*T. Buchanan*, for the appellant; and *C. Dorsey*, for the appellee.  
*Judgment affirmed.*

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SMITH & BUCHANAN vs. GORTON.

The Court of Appeals, having concurred in the opinion expressed by the County Court in the bill of exceptions, but reversed the judgment on the form of proceedings, awarded a *procedendo*.

APPEAL from Baltimore County Court. Assumpsit by the appellee against the appellants. The declaration contained two counts. The general issue was pleaded; and at the trial the plaintiff offered certain testimony in evidence. The defendants objected to the testimony being given to the jury in support of the issue joined on the second count in the declaration; but the County Court \* (H. RIDGELY, Ch. J.) overruled the objection, and permitted the evidence to be given to the jury. The defendants excepted; and the verdict and judgment being for the plaintiff, they appealed to this Court. 368

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, and GANTT, JJ. by

*Harper and Purviance*, for the appellants; and by

*Winder and Rogers*, for the appellee.

THE COURT were of opinion that there was error in the form of proceedings, the second count in the declaration being defective; but they concurred in the opinion expressed by the Court below in the bill of exceptions. *Judgment reversed, and precedendo awarded.*

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#### MUDD vs. REEVES.

The amount expressed in a note, purporting to be a genuine bank note, but which was proved to be forged, may be recovered in an action of *assumpsit* by the holder of the note from the person of whom he received it, although at the time of its receipt, neither party knew it not to be genuine, and the defendant did not warrant it to be genuine, or endorse it.

APPEAL from Charles County Court. An action of assumpsit was brought by the appellant against the appellee, and the declaration contained counts, for money had and received, for the price of a gelding sold, a *quantum meruit* for a gelding sold, for money paid, laid out and expended, for money lent and advanced. The general issue was pleaded. At the trial the plaintiff gave in evidence, that sometime before the bringing the action, he agreed with the defendant to sell him a horse for the sum of \$60, and that the defendant agreed to pay that sum for the horse; that the horse was to be delivered on the payment of the price agreed upon. That on the day after the agreement, the defendant sent to the plaintiff the paper produced, purporting to be a bank note of the Bank of Baltimore for \$100. That the person by whom the note was sent delivered it to the plaintiff, who, before receiving it, asked the opinion of one M'Pherson whether the note was genuine or not, who was of opinion that the note was genuine. That the plaintiff delivered the horse,

according to the defendant's request, to the person by whom the defendant had sent the note, and the plaintiff also, at the same time, according to the defendant's request, paid to the same person, for the defendant, \$40, being the difference between the sum specified in the note, and the price of the horse. That the defendant received the \$40. \* The plaintiff then gave in evidence, that the note **369** was forged. There was no evidence that the defendant or plaintiff knew or suspected that the note was forged, nor was there any evidence that the defendant had endorsed the note, or had expressly warranted it to be genuine; but both plaintiff and defendant considered it genuine at the time. The defendant then prayed the Court for their instruction to the jury, and the Court, (KEY and CLARKE, A. J.) according to the defendant's prayer, were of opinion, and did instruct the jury, that if they should be of opinion, from the evidence, that the defendant, at the time he sent the note to the plaintiff, did not know that it was a forged note, or had not endorsed it to the plaintiff, or expressly warranted it to be a good note, that the plaintiff was not entitled to recover; and that the law, from the evidence offered, did not imply a warranty or contract on the part of the defendant to pay the sum specified in the note, to the plaintiff, although the note was forged, unless he knew that the note was forged when he delivered it to the plaintiff, or had endorsed the note, or expressly warranted it to be a genuine one. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff brought this appeal.

The cause was argued before CHASE, Ch. J. BUCHANAN and NICHOLSON, JJ. by

*T. Buchanan and Chapman*, for the appellant; and by

*C. Dorsey and Baker*, for the appellee.

*Judgment reversed, and procedendo awarded.*

#### KEYS & HERON *vs.* GOLDSBOROUGH'S Lessee.

- A. P. by his will, devised to C. C. & A. M. all his real estate, to be sold by them for the payment of his debts. Evidence of a sale made at auction by them to W. G. of a part of the real estate, together with a memorandum of the sale, subscribed by the auctioneer, and a receipt given by them for the purchase money—*Held* to be admissible evidence to show a title at law in W. G. without a deed of bargain and sale, or other conveyance, to him from the trustees, and to be sufficient to enable his lessee to recover such real estate in an action of ejectment. (a)
- R. H. by his will, devised as follows: "I give and bequeath unto my dearly beloved son, C. H. the free use of my land called," &c. "with all the

(a) See *Lannay vs. Wilson*, 30 Md. 536; *Green vs. Drummond*, 31 Md. 71; *Boring vs. Lemmon*, 5 H. & J. 223.

houses," &c. "during his natural life, to occupy and enjoy the same; and after the decease of my said son C. H. I give and bequeath the said land called," &c. "with all the houses," &c. "unto the heirs of my son C. H. lawfully begotten of his body, forever; and for want of such heirs, I give," &c.—*Held* by the County Court that under this devise, C. H. took an estate in tail general. (a)

APPEAL from Dorchester County Court. This was an action of ejectment brought by the present appellee, (the plaintiff in the Court below,) to recover possession of a tract of land called Ennalls' Inheritance. The defendants \* (now appellants,) appeared and took

**370** general defence.

1. At the trial the plaintiff proved that Archibald Pattison, on the 9th of August, 1791, being seized of the land for which the action was brought, and of other lands, duly made his will, in which he stated that he meant and intended to dispose of all his estate, real and personal, and to charge all his real estate with the payment of his just debts. He then devised to his friends, Charles Crookshanks and Archibald Moncreiff, and the survivor of them, all his real and personal estate, to be sold and disposed of by them, in as full and ample manner as he himself could dispose of them, for the payment of his debts, leaving the manner of such disposition entirely to their own judgment and discretion; but it was his request and direction to them, that his lands on Transquakin River, bought of Captain Ennalls, and those bought of Stewart, should if possible be reserved, together with those taken up by him, which adjoined those purchased of Stewart, but more particularly the dwelling plantation where Col. Bartholomew Ennalls resided, which he directed should be last sold of any of his real estate, and, if possible reserved for his daughter. And, after the payment of his debts, he gave and bequeathed to his dear daughter, Mary Pattison, and the heirs of her body, all his estate real and personal, &c. He appointed Crookshanks and Moncreiff, executors of his will, and trustees for the sale of his real and personal estate, and directed that the said powers should be fully delegated to the survivor in case of the death of either, and that such survivor might delegate the same to his executor, if not before fully executed. The plaintiff also proved, that Pattison died seized of the land in dispute, and that after his death, Crookshanks and Moncreiff, on the 3d of December, 1791, caused the will to be duly proved, and on the same day renounced their right to the executorship. The plaintiff also proved that Crookshanks and Moncreiff took upon themselves the execution of the trusts mentioned in the will, and of the powers and authority therein contained and limited, and that afterwards, on the 15th of October, 1792, they exposed the tract of land called Ennalls' Inheritance, and also other lands, to sale at public auction, for the purpose of discharging the debts of Pattison,

(a) Cf. *Clarke vs. Smith*, 49 Md. 106.

and in pursuance of the trusts, and that the lessor of the plaintiff became the highest bidder and purchaser thereof, and \* the lands were sold and struck off to him by the trustees. The **371** plaintiff also gave in evidence the auctioneer's bill or memorandum of the sale, subscribed by him, which subscription, he being dead, was duly proved; and also the exemplification of a judgment recovered by Moncreiff, as the surviving trustee against the lessor of the plaintiff, for the purchase money arising from the said sale; and also a receipt given by Moncreiff to the lessor of the plaintiff, for the payment of the money so recovered, under the hand and seal of Moncreiff, duly proved, which payment was made before the commencement of this ejectment. The defendants objected to this evidence, and contended that it was inadmissible and incompetent to show a title at law in the lessor of the plaintiff to the land claimed in this ejectment; and moved the Court to direct the jury, that unless the plaintiff should produce and show a deed of bargain and sale, or other conveyance, duly executed, acknowledged and enrolled, according to law, in the usual forms of law, to the lessor of the plaintiff, for the lands so sold, the plaintiff was not entitled to recover. But the Court, [POLK, Ch. J. and ROBINS, A. J.] were of opinion, and determined that the evidence was admissible and competent to show a title at law in the lessor of the plaintiff, without a deed of bargain and sale, or other conveyance, and directed the jury, that if they believed the evidence, the same was sufficient to enable the plaintiff to recover. The defendants excepted.

2. The plaintiff then proved that Robert Heron, on the 29th of June, 1788, being seized of the tract of land called Ennalls' Inheritance, mentioned in the declaration, duly made his will, and thereby, as to such worldly estate as it had pleased God to bless him with, he devised as follows: "It is my will, and I do order, that in the first place all my just debts and funeral expenses be paid and satisfied. *Item*, I give and bequeath unto Elizabeth, my dearly beloved wife, during her widowhood, the use of all my estate real and personal," &c. "When it shall please God to take to himself my dear and loving wife, then my will and desire is, that my estate both real and personal, be given and bequeathed in manner following: *Item*, I give and bequeath unto my dearly beloved son Cuthbert Heron, the free use of my land whereon I now live, called Ennalls' Inheritance, being by estimation about 300 acres, with all \* the houses and **372** improvements thereon, during his natural life, to occupy and enjoy the same; and after the decease of my said son Cuthbert Heron, I give and bequeath the aforesaid lands called Ennalls' Inheritance, with all the houses and improvements thereon, unto the heirs of my said son Cuthbert Heron, lawfully begotten of his body, for ever; and for want of such heirs, I give and bequeath the aforesaid lands called Ennalls' Inheritance, with the improvements thereon, unto my dearly beloved son Robert Heron, and the heirs of his

body lawfully begotten, for ever; and for want of such issue, to my dearly beloved son Charles Heron, and the heirs of his body lawfully begotten, for ever, and for want of such issue, to my four daughters, to be equally divided amongst them, and the heirs of their bodies lawfully begotten, for ever. *Item*, I give and bequeath to my beloved son Robert Heron, a tract of land called Heron's First Addition, 267 acres, unto him the said Robert Heron, and the heirs of his body lawfully begotten, for ever." There was a similar devise of Heron's Second Addition to his son Charles. The plaintiff further proved, that being so seized, the said last named testator afterwards died, leaving the lands and tenements in his will mentioned, and the several children therein also mentioned. That Elizabeth Heron, the widow of the testator, survived him, and entered into the premises devised to her, and held the same during her widowhood, which ended with her life in the month of December, 1803, when she died. That Cuthbert Heron, the devisee in the will mentioned, also survived the testator, and on the 21st of May, 1784, being of lawful age, by deed of indenture duly executed, acknowledged and recorded, he granted, bargained and sold, Ennalls' Inheritance, with other land, with the appurtenances, to Archibald Pattison, and his heirs, in fee simple, under whom the lessor of the plaintiff claims. That Cuthbert Heron afterwards, in the year 1790, died, leaving lawful issue, Cuthbert Heron, one of the defendants, his eldest son and heir at law. The defendants objected to the title claimed by the plaintiff, and contended that Cuthbert Heron, under the will of Robert Heron, took only an estate for life in the lands devised to him, and had no lawful power to make a conveyance of the said lands beyond his natural life. But the Court, [ROBINS, A. J.] was of opinion, and **373** decided, that Cuthbert Heron, \* took an estate in tail general in the lands devised to him by Robert Heron, and therefore had lawful power, according to the laws of this State, to make the conveyance of the 21st May, 1784, and directed the jury accordingly. The defendants excepted. Verdict and judgment for the plaintiff, and the defendants appealed to this Court.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, JJ. by

*Hammond, Campbell, Carmichael, and Kerr*, for the appellants; and by

*Martin, Bullitt, J. Bayly, and W. B. Martin*, for the appellee.

THE COURT concurred with the Court below in the opinion given as stated in the first bill of exceptions; but as to that expressed in the second they gave no opinion, in consequence of the parties wishing to effect a compromise.

*Judgment affirmed.*



LEEKE'S Adm'r *d. b. n.* vs. BEANES.

The not returning an inventory on the estate of an intestate by his administrator, is not sufficient evidence to charge the administrator with a debt of the intestate.

ERROR to the General Court. Debt on a bond for the payment of money, dated in 1797, executed by the intestate of the appellant to the appellee. Payment and *plene administravit* were pleaded, to which there were the general replications, and issues joined. The facts were these: The bond, on which the suit was brought, was executed by Frank Leeke, the obligor, who died intestate, and S. Leeke took out letters of administration on his estate, and gave bond as the law required, for its due administration. S. Leeke died intestate, without having returned an inventory on the estate of F. Leeke. S. Hepburn, the defendant, (now appellant,) after the death of S. Leeke, took out letters of administration *de bonis non* on the estate of F. Leeke, and gave bond for the due administration of the estate of F. Leeke, unadministered by S. Leeke. Hepburn did not return an inventory on the estate of F. Leeke within twelve months from taking out the letters *de bonis non*, nor had he done so at the time of bringing this suit. The question submitted on these facts to the Court was \* whether they were sufficient to charge the defendant below with the debt for which the suit was instituted? **371** The General Court, at October Term, 1804, were of opinion they were sufficient, and gave judgment for the plaintiff. The defendant brought the present writ of error.

The cause was argued in this Court before POLK, BUCHANAN, NICHOLSON and EARLE, JJ.

*Magruder*, for the plaintiff in error, cited *Morgan vs. Slade, et ux. ante* 38; *Wilson's Ex'r vs. Slade et ux. ante* 281; and *Peake's Evid.* 345, 346.

*Shaff*, for the defendant in error, cited *Swinb.* 420; and the Act of 1798, ch. 101.

*Judgment reversed.*

## GANTT vs. BOWIE'S Adm'r. SAME vs. SAME.

The defendant, as surety for F. B. on a bond for the payment of money given to the plaintiff as trustee for the sale of an estate, having pleaded payment, at the trial offered to file an account in bar, claiming in the name of F. B. a sum of money due to him as his proportion of the amount of the sales of the said estate—*Held*, that the account could not be filed.

To establish the above account in bar, the defendant offered to read a copy, under seal, of a decree of the Court of Chancery, for the sale of the estate of J. E. and the appointment of the plaintiff trustee to make the

sale, and the trustee's report of the sale and ratification by the Chancellor, together with the auditor's statement and ratification thereof showing the proportion due to the creditors, and among others of the sum due to F. B. above named, and claimed to be set off—*Held*, that such evidence was inadmissible.

The plaintiff to show that F. B. was not entitled to the proportion adjudged to him out of the proceeds of the sale of the real estate of J. E.; and to prove that F. B. was one of the sureties in the administration on the personal estate of J. E. and that it had been misapplied, and not legally administered, offered in evidence the administration bond, and an account signed by F. B. for the administratrix—*Held*, that the evidence was not admissible.

APPEALS from Prince George's County Court. They were two actions of debt on joint and several bonds, given to the appellant, as trustee appointed by the Court of Chancery for the sale of the real estate of J. Eversfield, each by F. Bowie, with the appellee's intestate, and J. Brown, his sureties; each bond was conditioned for the payment of £19 5 0. The defendant, (now appellee,) in each case pleaded payment by his intestate, to which there was the general replication, and issue joined.

1. At the trial of the first cause at September Term, 1801, after the jury were sworn, the defendant produced and offered to file the following account in bar. "Thomas Gantt, trustee for the creditors of John Eversfield, to Fielder Bowie, Dr.

1793. To the sum adjudged to be due me by the Chancellor as my proportion of the amount of the sales of John Eversfield's real estate .....£67 3 3¼"

To which the plaintiff objected. But the County Court overruled the objection, and permitted the account to be filed, and the same was filed. The plaintiff excepted.

\* 2. At the trial of the second cause at April Term, 1802, it **375** having been agreed between the parties that the plea of discount might be pleaded and made up in a regular manner, and that anything might be given in evidence, which could legally be given in evidence under that plea, the plaintiff offered in evidence, that the bond on which this suit was brought was given by F. Bowie, as the principal obligor, and A. Bowie, deceased, and J. Brown, his sureties, to the plaintiff, as trustee for the sale of J. Eversfield's real estate, and that the money claimed to be due thereon is not claimed by the plaintiff in his individual capacity, but as trustee as aforesaid. To establish the plea of discount in this cause, and to have the account in bar mentioned therein discounted out of the bond on which this suit is brought, the defendant offered in evidence a copy, under seal, of the decree made in the Court of Chancery in the case of the creditors of John Eversfield, deceased, against Mary, his only daughter and heir, decreeing that the real estate of the said Eversfield, which descended to his daughter Mary, be sold for the payment of the debts of her father, and that T. Gantt, (the plaintiff,) be appointed trustee to

sell the said real estate; that he should divide the purchase money into six or more equal parts, and take a separate bond for each part, in order that the same might be assigned amongst the creditors in case they should so elect, and it should appear to the Court proper to be so done. That he should bring into Court the money arising from the sale, to be applied in satisfying just claims against the deceased. Also a copy, under seal, of the report made by the trustee of the sale of the said real estate, and the Chancellor's order ratifying the same; and the auditor's statement of the proportions due to the creditors, and among others, to F. Bowie, of £28 12 1, and £18 18 1; to F. Bowie & Co., £77 14 4; to A. Bowie, (the defendant's intestate,) £6 16 11, and to Contees and Bowies £15 17 10. Which statement was approved and ratified by the Chancellor. The defendant also offered to prove, that F. Bowie mentioned therein, is the same F. Bowie mentioned in the bond on which this suit is brought. The plaintiff objected to the copy of the decree, &c. being read in evidence. But the Court, [SPRIGG, Ch. J.] overruled the objection, and permitted the same to be read, and it was read accordingly. The plaintiff excepted.

\* 3. The plaintiff to prove that F. Bowie was one of the sureties in the administration bond on the personal estate of **376** J. Eversfield, and that the personal estate had been misapplied, and not legally administered, offered in evidence the administration bond, and account signed by F. Bowie, for the administratrix, and intending to prove thereby that F. Bowie was not entitled to a proportion of the sales of the real estate of J. Eversfield, equal to the sums awarded to him. The defendant objected to the same being proved and read in evidence; and the County Court, [SPRIGG, Ch. J. and DUCKETT, A. J.] being divided in opinion, the same was not permitted to be proved or offered in evidence. The plaintiff excepted. Verdicts and judgments in both cases for the defendant, and the plaintiff prosecuted these appeals.

The causes were argued before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, JJ. by

*Magruder*, for the appellant; and *T. Buchanan*, for the appellee.

THE COURT dissented from the opinions of the Court below, given in the first and second bills of exceptions, as herein stated, and concurred with that Court in the opinion given in the third bill of exceptions. *Judgments reversed, and procedendos awarded.*

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BARNES *vs.* BLACKISTON *et al.*

B. and J. sold and delivered to H. B. a quantity of sugar, under a parol agreement with J. R. that J. R. would pay for the sugar if H. B. did

not. J. R. paid B. and J. for the sugar; and an action of *assumpsit* was brought in the names of B. and J. for the use of J. R.—*Held*, that it could not be sustained.

As a matter of practice, the evidence offered to the jury on which the opinion of the Court is prayed, ought to be stated in the bill of exceptions. The Court of Appeals, however, will retain a bill of exceptions where the Court below was called on and did give a direction to the jury, although no facts are stated therein (a)

APPEAL from Charles County Court. This was an action of *assumpsit*, brought by the appellees, and entered for the use of James Robertson, against the appellant. The declaration contained a count for goods, wares and merchandises, properly chargeable in account, as by a particular account, &c. a count for money paid, laid out and expended, and a count on a *quantum meruit* for goods, &c. property chargeable in account, sold and delivered. An account was filed with the declaration, in which the defendant was charged as debtor to the plaintiffs, on the 3d of December, 1799, "to 1 hhd. **377** sugar, p. bill p. Mr. James \* Robertson, on 90 days credit, \$174 55." At the trial of the cause, the defendant moved the Court to direct the jury, that if they find from the evidence that the plaintiffs sold and delivered to the defendant the sugar mentioned in the declaration, under a parol agreement with James Robertson, (for whose use the suit is endorsed on the record,) that he Robertson would pay for the sugar if the defendant did not, and that Robertson did pay the plaintiffs for the sugar, in virtue of his agreement, at the request of the plaintiffs, that then the action cannot be maintained in the names of the plaintiffs, for the use of Robertson, but that Robertson should have brought an action in his own name for money advanced, or laid out and expended, for the defendant. Which opinion and direction the County Court, [SPRIGG, Ch. J.] refused to give to the jury. The defendant excepted; and the verdict and judgment being for the plaintiffs, the defendant prosecuted this appeal.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, JJ.

*T. Buchanan*, for the appellant, contended, that the judgment of the Court below must be reversed. That it was too plain a case to require an argument.

*Shaff*, for the appellee. The claim is a proper one against the appellant, yet the action may have been misconceived. This Court can only look at the declaration and the bill of exceptions. The Court below were right in refusing to give the opinion prayed for, if there was no evidence in the case. There are no facts stated in

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(a) Approved in *Brice vs. Randall*, 7 G. & J. 353. See *Evans' Prac.* 396. 2 *Poe's Pldg.* secs. 314-319.

the bill of exceptions, but a hypothetical opinion prayed to be given by the Court, which the Court very properly refused to give. No evidence was offered that the money was paid by Robertson, or any agreement that he would pay it, if the defendant did not; and this Court cannot say that the Court below erred in refusing to give an opinion where no facts were proved to justify such opinion being given. It is not stated that the defendant offered to prove the fact of payment by Robertson, nor that the plaintiffs had been paid. If the judgment is reversed, this Court will say that the opinion ought to have been given by the Court below, although founded on no facts. It cannot be inferred \* by this Court judicially, that there was any evidence offered at all. This Court cannot **378** travel out of the record. It is important that facts should be stated; and this Court cannot reverse this judgment, as there was no statement of facts upon which the opinion and direction, as prayed, could be given.

*T. Buchanan*, in reply. Hypothetical opinions have been often given in the late General Court, and Courts do so when they do not require the whole facts spread upon the record. It is done to prevent the drawing up the facts, and crowding the record, and to save expense to the parties. Such was the practice in the cases of *Lawrence vs. Devalt*, (October Term, 1794.) *Mahony vs. Ashton*, 4 H. & McH. 296, 305; *Newman vs. Morris*, 4 H. & McH. 421; *Queen vs. Ashton*, 3 H. & McH. 339; *Worthington vs. Filthy*, (October Term, 1791;) and *Reeves vs. Middleton*, (May Term, 1793.)

CHASE, Ch. J. In every case where the Court are called upon to give a direction to the jury, the facts should appear, and the opinion of the Court will depend upon the nature of the evidence, and unless it does appear what the facts are, it cannot be said the Court erred in their opinion by refusing to give the opinion asked for. If a contrary practice prevailed, the Court might be called upon to decide upon questions not arising in the case. I am of opinion, that the bill of exceptions in this case ought not to be retained by this Court.

BUCHANAN J. As the Court below has not stated that they refused the prayer, because the facts were not stated or proved, this Court are bound to decide on the law in the case. The most regular way would be to state the facts, or that there were no such facts, if none existed in the case. If in this case there had been no facts to justify the opinion being given, the plaintiffs should have stated in the bill of exceptions that the facts did not exist. As a matter of practice, the evidence should be stated. It is \* my opinion, **379** that the bill of exceptions taken in the case ought to be retained.

NICHOLSON, J. concurred with BUCHANAN, J.

*Judgment reversed.*

## LOUDERMAN, Garnishee of HARRISON vs. WILSON.

A sum of money due and owing, and which by express agreement was to be paid in work and labor, is a credit, which may be attached in virtue of the attachment laws of 1715, ch. 40, and 1795, ch. 56.

ERROR to the General Court. Attachment on warrant; and the case was, that at the time of issuing the attachment from the County Court, Harrison, the original defendant, owed Wilson, the plaintiff, (now appellee) the amount of the account exhibited; Louderman, the garnishee, was indebted to Harrison in the sum of \$35, which sum, by express agreement, was to be paid and satisfied in work and labor by the garnishee for Harrison, when requested. No demand was ever made upon the garnishee to do the work, but he was always ready to do it. The County Court decided, that it was not a credit in the hands of the garnishee which could be attached in virtue of the Acts of 1715, ch. 40, and 1795, ch. 56; and judgment being rendered for the defendant in the County Court, the plaintiff appealed to the General Court, where the judgment of the County Court was reversed at May Term, 1804, and a *procedendo* awarded. The appellee brought a writ of error to this Court.

The cause was argued before POLK, BUCHANAN, NICHOLSON, and EARLE, JJ. by

*Kell*, for the plaintiff in error, and *Gwynn*, for the defendant in error.

*Judgment of reversal affirmed.*

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## \* HALL vs. GITTINGS' Lessee.

If the possession of land has gone agreeably to an ancient deed, which needed no enrolment, the *insperimus* of the deed may be read in evidence, and is effectual to pass the land.

Where a deed for part of a tract of land has not been particularly located on the plots in the cause, it may be read in evidence if the whole tract is united in the same person, and the whole has been located. (a)

A *feme covert*, one of the grantors in a deed conveying a tract of land, the acknowledgment of which by her having been declared defective, was admitted to give evidence on the part of the defendant in an action of ejectment brought for the same land by a person claiming under her deed. (Note.)

If a grantor of land, residing in a particular county, and having a temporary residence in another county, in neither of which counties does the land lie, acknowledges the deed in the county in which his temporary

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(a) Affirmed in *Langley vs. Jones*, 28 Md. 473. See *Hall vs. Gough*, 1 H. & J. 77.

residence is, such deed is not good and valid in law to pass and transfer the grantor's interest in the land. (a)

A temporary residence in any county of the State is not sufficient to enable a grantor, being a citizen of the State, to acknowledge a deed, during such temporary residence, for land lying in any other county of the State.

The words "legally authorized and assigned," in a certificate of the clerk of a County Court to a deed acknowledged before two Justices of the Peace of that county, is a substantial compliance with the directions, and within the meaning of the Act of November, 1766, ch. 14, and are words of the same import as "duly commissioned and sworn." (b)

Where the defendant in an action of ejectment, was in possession of 100 acres of land, by enclosures and cultivation, for 15 years, and then enlarged his enclosures so as to include 150 acres, and he possessed the same, so enlarged, by enclosures for six years thereafter, claiming the same as his own—*Held*, that he had title to the 100 acres by adversary possession.

Where the expressions used in a grant of land describe it as "lying on the ridge of Gunpowder River, beginning at a bounded oak, being the westernmost bounds of a tract of land laid out for M. S. and running west 500 ps. to a bounded oak standing by the Great Falls, and running N. from the said oak," &c.—*Held*, that they do not operate to bind the first line to terminate at the Great Falls, although no evidence be given of the tree or place where it stood.

The declarations by a deceased person, then seized of a particular tract of land not located on the plots in the cause, were offered in evidence by the defendant in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant.—*Held*, that the declarations were not admissible in evidence.

In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, part of a tract of land called H. F. the jury, by their verdict, found the true location of that tract, and also the locations of other tracts of land for which the defendant took defence. They also found for the plaintiff all the land called H. F. as located by them, which lies clear of the other tracts, so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and J. S. from a particular point to another.—*Held*, that the verdict, and the judgment thereon rendered, were not uncertain, and were not for more land than the plaintiff claimed in his action.

**ERROR to the General Court.** In this case there was a *procedendo* from the late Court of Appeals, directing a new trial of an action of ejectment, (which had been tried in the General Court at May Term, 1800,) for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, being part of a tract of land called Hill's Forest, situate in Baltimore County. (See 1 H. & J. 14.) The defendant

(a) Examined in *Fouke vs. Fleming*, 13 Md. 409. See *Grove vs. Todd*, 41 Md. 633; *Johns vs. Reardon*, 3 Md. Ch. 61; Rev. Code, Art. 44, sec. 9.

(b) Approved in *Friend vs. Hamill*, 34 Md. 302, and in *Marlow vs. McCubbin*, 40 Md. 137, and examined in *Warner vs. Hardy*, 6 Md. 537. See *Hollingsworth vs. McDonald*, ante, 237.

took defence for Cullen's Lot, and Cullen's Addition, on the plots made and returned. Judgment was entered against the casual ejector for all the lands undefended.

1. The plaintiff at the new trial at May Term, 1805, produced in evidence a certificate of survey of a tract of land called Hill's Forest, made for Richard Hill on the 4th of October, 1683-4, in pursuance of a warrant granted him for 1,000 acres, on the 31st of July, 1683, "lying in Baltimore County, in the woods above the head of a river called Gunpowder River, and upon the S. side of the N. Branch of the said river, beginning at a bounded red oak standing at the end of the N. line of a parcel of land formerly taken up for James Thompson, (a), and running from thence W. parallel with the said land for the length of 520 perches, then running from the end of the W. line N. 310 perches, then running from the end of the N. line E. 520 perches, until it intersects the land called Clarkson's Hope, then running \* with the said land, and a parcel of land called Gassaway's Ridge, by a straight line to the first bounded tree, containing and laid out for 1,000 acres of land more or less." Also a patent granted to Richard Hill, on the 10th of August, 1684, for that land. Also the will of Richard Hill, dated the 20th of October, 1700, whereby he devised to his sons Richard, Joseph and Henry, by a residuary devise in the will, the said land, equally to be divided, to them and their heirs, for ever. Also the will of Joseph Hill, dated the 21st of May, 1724, whereby he devised the remainder of his estate, both real and personal, including the said tract of land, to his brother Henry Hill, (son of the patentee,) and his heirs, for ever. Also the entries on the rent roll, showing that Hill's Forest, 1,000 acres, was in possession of Joseph Hill, and stating therein an alienation of the land from Henry Hill to Joseph Hill, on the 27th of July, 1737. Also a copy of a deed from Henry Hill, son of the patentee, to Joseph Hill, dated the 27th of July, 1737, and the record book, with the deed therein recorded, in the following words: (See it set forth in 1 *H. & J.* 16.) Also the will of Joseph Hill, dated the 20th of October, 1761, whereby he devised to his granddaughter, Henry Margaret Hill, all the remainder of his tract of land called Hill's Forest, not devised to Nathaniel and Joseph Richardson. He devised to Joseph Richardson 200 acres, to be laid off at the easternmost end of Hill's Forest, and to Nathaniel Richardson 200 acres, to be laid off at the westernmost end of Hill's Forest, and the residue, 600 acres in the middle, he devised to his granddaughter Henry Margaret Hill, (now Ogle,) in fee. Also a deed from Joseph Richardson to Charles Wells, dated the 27th of March, 1779, for 200 acres of land, part of the land called Hill's Forest. Also a deed from Charles Wells to George Buchanan, dated the 9th of October, 1784, for the 200 acres of land, part of Hill's Forest. Also a deed from George

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(a) Called "Thompson's Choice."



Buchanan to James Gittings, the lessor of the plaintiff, dated the 28th of December, 1789, for the last mentioned 200 acres of land. Also a deed from Benjamin Ogle, and Henry Margaret his wife, to James Bosley, dated the 25th of June, 1777, for part of the tract called Hill's Forest, supposed to contain 430 acres. Also a deed from James Bosley to George Buchanan, dated the 16th of June, 1784, for the last mentioned part of Hill's Forest. Also a deed \* from George Buchanan to James Gittings, the lessor of the plaintiff, dated the 28th of December, 1789, for the last mentioned part of Hill's Forest. Also the Proprietary debt books from 1754 to 1762, showing that Joseph Hill was charged with 1,000 acres of Hill's Forest; also the debt books from 1762 to 1771, shewing that Joseph Hill's heirs were charged with the said land; and also the debt books in 1771, showing that Joseph Richardson was charged with 200 acres, Nathaniel Richardson with 200 acres, and Henry M. Hill with 600 acres of Hill's Forest. The defendant objected to the reading of the deed before mentioned, from Henry Hill to Joseph Hill, dated the 27th of July, 1737. **382**

*Martin*, (Attorney-General,) for the plaintiff, cited *Bull. N. P.* 254; *Style*, 205, 445; 2 *Bac. Ab.* 308; *Kendall's Case*, 3 *Lev.* 387, 888; *Medlicott vs. Joyner*, 1 *Mod.* 4; *Martin vs. Monke*, 5 *Mod.* 211; *Sir Edward Seymour's Case*, 10 *Mod.* 8; *Combs vs. Dowell*, 2 *Vern.* 591; *Stanyon vs. Davis*, 6 *Mod.* 225; *Taylor vs. Jones*, 1 *Ld. Raym.* 746; *Woodward vs. Aston*, 1 *Vent.* 296, 297; *Saltern vs. Melhuish*, *Ambl.* 247, 248; *Gilb. L. E.* 97, 98, 101; *Lofft's Gilb.* 102; 2 *Bac. Ab. tit. Evidence*, (F) 646; 3 *Com. Dig. tit. Evidence*, (B. 2;) and *Smartle vs. Williams*, 1 *Salk.* 280, 281.

CHASE, Ch. J. The Court were of opinion, in the former trial between these parties, that a copy of a deed which needs no enrolment is not evidence. But the present question is, whether the *inspeximus* of the enrolment of a deed, which requires no enrolment, is good evidence, it being accompanied with other circumstances, such as antiquity, and possession going with it.

The Court are of opinion, that if possession is found to have gone agreeably to the deed, it being an ancient deed, the *inspeximus* of the deed, though it does not require recording, may be read in evidence, and the deed is good and effectual to pass the land. But if the jury do not find that possession has gone with the deed, then the *inspeximus* is not evidence, and the jury are to disregard the deed.

The Court consider the distinction is well established.

2. The defendant objected to the reading in evidence the deed, herein before mentioned, from Joseph Richardson to Charles Wells, dated the 27th of March, 1779, for 200 acres of land, part of Hill's

Forest, as that deed was not located on the plots returned in the cause.

**363** \* *Martin*, (Attorney-General,) for the plaintiff, referred to *Hall vs. Gough*, 1 H. & J. 119.

CHASE, Ch. J. If the title to the 200 acres, and the 600 acres, are united in the same person, by laying down the whole, the 200 acres are sufficiently located. The Court are of opinion, that the deed may be read in evidence to the jury, although it has not been particularly located on the plots.

3. The first bill of exceptions.—The deed from Benjamin Ogle, and wife, to James Bosley, having been adjudged defective by the Court of Appeals, and the judgment in the former trial between the parties reversed, because of the opinion of this Court as contained in the second bill of exceptions, and the Court of Appeals having expressed an opinion that the plaintiff might give evidence that Mr. Ogle resided in Prince George's County at the time he executed the deed, if that was the case, and the plaintiff having produced, and read to the Court and jury, the deed from Benjamin Ogle and Henry Margaret his wife, to James Bosley, dated the 25th of June, 1777, stated to be "between Benjamin Ogle, Esquire, and Henry Margaret, his wife, of Anne Arundel County, in the State of Maryland, of the one part, and James Bosley, son of Charles, of Baltimore County, in the State aforesaid, of the other part," and that "for and in consideration of the sum of fourteen hundred pounds common current money, to them in hand already paid," Ogle, and wife granted, &c. to Bosley, "all their, and each of their right," &c. "of, in and unto, a certain tract or parcel of land, being part of a tract of land called Hill's Forest, lying in Baltimore County, containing by estimation four hundred and thirty-one acres, with all," &c. This deed was executed by Ogle, and wife, and acknowledged as follows: "Be it remembered, that the within named Benjamin Ogle, Esquire, and Henry Margaret, his wife, came before us the subscribers, justices of the peace for Prince George's County, of the State of Maryland, and acknowledged the within deed to be their act, and the lands and premises, with their appurtenances, thereby bargained and sold, to be the estate of the within named James Bosley, son of Charles, his heirs and assigns, for ever: And the said Henry Margaret, wife to the said Benjamin Ogle, Esquire, being by us examined privately  
**384** \* out of the hearing of her husband, declared that she made the above acknowledgment willingly and freely, and without being induced thereto by force or threats of ill-usage by her husband, or fear of his displeasure.

Taken and certified,

THOMAS WILLIAMS,  
THOS. BOYD."

At the foot of the acknowledgment was the following certificate, given by the clerk of Prince George's County Court: "Prince

George's County, to wit: In testimony that Thomas Williams and Thomas Boyd, gentlemen, before whom the above acknowledgment was made, and who have thereto affixed their signatures, were at the time of taking and affixing the same, and still are, two of the justices of the peace for the county aforesaid, legally authorized and assigned, and to all certificates by them so signed, due faith and credit is and ought to be given as well in justice Courts, as thereout,

I have hereunto set my hand and affixed the public  
(SEAL.) seal of office, this 14th day of July, Anno Domini 1777.

JOHN READ MAGRUDER, Clk."

The deed, with the several endorsements thereon, was recorded amongst the land records of Baltimore County, on the 20th of September, 1777. The plaintiff then offered evidence to the jury, by the testimony of Benjamin Ogle, Esquire, one of the grantors named in the deed, who deposed that in 1774 he became seized and possessed of an estate in Prince George's County, called Belle-Air, upon which estate there then was, and still is, a large and commodious furnished house; that he considered the City of Annapolis, near to which he had a large landed estate, as the place of his residence from the year 1770 down to this time; that in the County of Anne Arundel he voted, was summoned to serve as a juryman, and was permitted to enjoy the right of passing the various ferries in the said county without paying ferriage, none of which privileges or immunities were ever enjoyed by him in the County of Prince George's. That from the time he became possessed of the estate called Belle-Air, until the year 1790, it was customary for him occasionally, every year, to go with his family to that estate, and lived there for a time, sometimes for a longer and sometime for a shorter period of time. That on the 25th of June, 1777, he was with his wife at his seat \* called Belle-Air, in Prince George's County, (their children being at West River,) and there, together with **385** his wife, executed and acknowledged the deed from himself and wife to James Bosley. That he was himself in the City of Annapolis in August, 1777, when the British fleet passed up the Chesapeake Bay, but that his family were then at Belle-Air. The plaintiff, with the consent of the defendant, produced and read in evidence the deposition of John Thomas (a), in the following words: "That he hath, from an early period of his life, been acquainted with Benjamin Ogle, Esquire, and with his lady; that Mr. Ogle resided, and still resides, in the City of Annapolis, where he has a large and commodious house and lot, his place of residence, and near to which city he held, and still continues to hold, a large and valuable landed estate; that previous to the year 1777, Mr. Ogle recovered, by a suit in Chancery, from his late uncle, Col. Benjamin Tasker, a valuable landed estate in Prince George's County, and that Mr. Ogle,

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(a) Mr. Thomas resided at West River, and was uncle to Mrs. Ogle.

during the summer season, generally, with his lady, spent a great part of his time at Belle-Air, on the land recovered as aforesaid, but that his household furniture and servants still remain at his dwelling-house in Annapolis. He well remembers that Mr. Ogle and family remained at Annapolis the first part of the year 1777, he thinks until the month of April, or the beginning of May, and that Mr. and Mrs. Ogle were at Belle-Air the latter part of the month of that year. In June of the same year, this affirmant was twice at Mr. Ogle's dwelling-house in Annapolis, where he and his lady then were, with his servants, and that this affirmant, as he had been accustomed for many years, lodged there. He may have been oftener with them, but of that he has no distinct recollection. That in August and September, Mr. and Mrs. Ogle were at Belle-Air; that in the fall of 1777 his kitchen, in Annapolis, was burnt down. However they were in said dwelling-house in the spring of 1778. The winter following they resided in the now government-house, and remained there until the spring of 1779. That he always did, and doth now, consider Annapolis as the place of residence of Mr. Ogle, and that he never did reside in \* Prince George's County; his **386** retiring there in the summer season, he conceived as a visit from home, and not as going to constitute a new residence." The plaintiff also offered in evidence, by the testimony of Mrs. Mary Ridout, sister of Benjamin Ogle, that her brother, upon his marriage, which took place in September, 1770, settled in Annapolis, and has resided there ever since. That when he got possession of his estate called Belle-Air, there was upon it a large and commodious furnished dwelling-house; that it was usual for him to go occasionally every year with his family and spend sometime at his seat; that she cannot now recollect when her brother first began to reside occasionally at his said country seat, nor can she recollect the time or season of the year when he usually went to it, but she remembers that she herself spent the summer of 1777 at Bath, in Virginia, and upon her return home from Bath, in the month of September, 1777, she called at the seat of her brother in Prince George's County, called Belle-Air, and spent some days there; at that time her brother and his family were residing there. Being asked by the counsel for the defendant, whether she considered Belle-Air or Annapolis the place of residence of her brother? she answered, both; that in her estimation, when a gentleman had a town house, and country house, and occasionally spent part of his time at each of them, he resided in both of them. The defendant then produced, and swore to the jury, Henry Margaret Ogle (a), who deposed, that

(a) The counsel for the plaintiff objected to Mrs. Ogle's being examined, contending that she was called to defeat her own deed. The case of *Wilnot vs. Talbot*, 3 H. & McH. 2, was cited by the defendant's counsel to show, that a wife was examined to prove that her husband had destroyed the will of his father, whereby he had devised the land in question to his grandson.

about the middle of May, 1777, her grandmother died; that about this period, or some short time before she sent her children to West River, in Anne Arundel County, to the house of her uncle Mr. John Thomas, to keep them from taking the small-pox, which then prevailed in Annapolis, that the children continued at West River for two or three months; that Mr. Ogle and herself, and at times \* herself only, went to see them at West River, and in going 387 to West River from Annapolis, and from West River to Annapolis, she and Mr. Ogle, occasionally called at Belle-Air, their seat in Prince George's County, and staid one or two nights; but she does not remember ever to have staid at Belle Air more than two nights, unless her children were with her. That the deed from Mr. Ogle and herself to Bosley, of the 25th of June, 1777, was executed at Belle-Air, on one of those occasional visits when she and Mr. Ogle were passing from Annapolis to West River, or from West River to Annapolis. That it was executed just before they left Belle-Air, which she well remembers, because, seeing persons coming to the house, she was afraid she should be detained at Belle-Air; that the persons proved to be the party who bought the land, coming to tender continental money in payment of it, and to have the deed executed. That she and Mr. Ogle had not their children at Belle-Air in the year 1777, until after Mr. Ogle's return from Berkley County. That Annapolis, in Anne Arundel County, she always considered their place of residence. That at different times of the year, and of different years, they occasionally spent part of their time with their family at Belle-Air, and in some years they went to Belle-Air only for a day or two at a time. That Mr. Ogle has a large landed estate in his cultivation nearly adjoining to Annapolis. The defendant also proved by Benjamin Ogle, that he went in the year 1777 to Berkley County, in Virginia; that he went there after the 25th of June, 1777, and returned before the 10th of July, 1777, and that in 1777, he did not take up his temporary residence at Belle-Air, until after his return from Berkley. That he was at Belle-Air in 1777, before the execution of the deed, and at its execution, but does not remember the time he went there, nor how long he staid there. That from Annapolis to Mr. John Thomas' at West River, is 14 miles, to Belle-Air is 18 miles, and from Belle-Air to West River is 14 miles. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if they are satisfied from the evidence that Benjamin Ogle had and kept two dwelling-houses furnished, to wit, a town house and country house, from the year 1774,

CHASE, Ch. J. The Court are of opinion, that Mrs. Ogle is a legal and competent witness. The acknowledgment of the deed made by her is defective, and the deed does not operate to convey more than Mr. Ogle's life estate, and the verdict in this case would not be evidence for her or her heirs.

**388** to the year 1780, the town house situate in Annapolis, in the County of Anne Arundel, the country house situate in the County of Prince George's, and that during the time his residence was principally in Annapolis, though in each of the years aforesaid he occasionally went with his family to his country house in Prince George's, and resided there for a time, sometimes for a longer and sometimes for a shorter period in each of the years aforesaid, and that he with his wife were, on the 25th of June, 1777, at his country house in Prince George's County, and then and there, with his wife, executed the deed of that date to Bosley, that then the deed, so executed, was and is good and sufficient in law to pass and transfer, from Ogle to Bosley, all interest which Ogle then had in and to the lands mentioned in, and intended to be conveyed by, the deed.

*Martin*, (Attorney-General,) and *Mason*, for the plaintiff, stated, that the question was, whether Mr. Ogle had, on the testimony in the cause, such a living or residence in Prince George's County as to justify his acknowledging in that county the deed from him and wife to Bosley? Or whether a deed acknowledged in Prince George's County, before two justices of the peace of that county, for lands lying in Baltimore County, by persons who are stated in the deed to be of Anne Arundel County, was a good and sufficient deed in law to pass and transfer the estate to the grantee? To show that Mr. Ogle had a sufficient residence in Prince George's County, to enable him to execute the deed in that county, they referred to the Acts of 1715, ch. 47, s. 8, 9, and November, 1766, ch. 14, s. 2, 3; *Sim & Lee vs. Dealins*, 2 H. & McH. 46; *Johns. Dict. tit. Reside*; *Foster's Cr. L.* 76; and 4 *Coke*, 40.

*Pinkney*, *Key*, *Johnson* and *Harper*, for the defendant, stated that the question submitted to the Court was, what constituted a residence within the meaning of the Act of November, 1766, ch. 14, s. 2, 3? They contended, 1. That at the time the deed from Ogle and wife to Bosley was executed, the grantors did not reside in the County of Prince George's, and therefore, that deed did not transfer the estate thereby intended to be conveyed, to the grantee. They referred to the Acts of 1715, ch. 47, s. 8, 9; November, 1766, ch. 14, s. 2, 3; July, 1729, ch. 8, s. 5; 1793, ch. 53, s. 7, 22; and 1796, ch. 43, s. 14; Const. Art. 2, 16, 42. The Act of 1799, ch. 50, s. 11, 12; *Johns.*

**389** \* *Dict. tit. Reside—Residence—Resident*, and the several examples; *Boyer's Dict. tit. Resider*; *Cunn. Dict. tit. Residence*; *Jacob's L. D. tit. Resiance—Resiant*.

2. They also contended, that the certificate made on the deed by the clerk of Prince George's County Court does not pursue the words of the Act of Assembly of November, 1766, ch. 14, s. 3, he having used the words "legally authorized and assigned," instead of the words of the Act, "duly commissioned and sworn." That intend-

ment could not be admitted to supply the omission of the words used in the law; and that if intendment could be admitted, there was not sufficient matter stated in the certificate to show that the justices had been sworn. Acts of February, 1777, ch. 5, and 1796, ch. 43, s. 17; and *Dyson vs. West*, 1 H. & J. 567.

*Martin*, (Attorney-General,) and *Mason*, in reply to the second point, referred to the Acts of 1785, ch. 9, s. 8, 9, and 1797, ch. 103; *Griffith vs. Ridgely*, 2 H. & McH. 418; and *Sim & Lee vs. Deakins*, *Ibid.*, 46.

CHASE, Ch. J. The Court are of opinion, that this case is not distinguishable from the case of *Sim & Lee vs. Deakins*, and that the principles of that case must govern. In that case Warder, by coming into Maryland, acquired a temporary residence sufficient, under the Act of Assembly, for the purpose of executing and acknowledging the deed. That while in Maryland he owed temporary allegiance, and during his residence was subject to the laws.

By the law of nations a stranger is subject to, and has the protection of the laws of the country or State into which he may go. But the Court are of opinion, that the term residence is a general term merely to express the abode of the person.

The Court are of opinion, that if the jury should find that Benjamin Ogle's principal residence was in Annapolis, in Anne Arundel County; that he voted, served on juries, and was enrolled in the militia in that county, and no other county; and that from the year 1774 to the year 1780, he with his family temporarily resided at Belle-Air, in Prince George's County, during the summer and autumn \* of the said years, sometimes for a longer and sometimes for a shorter time; and should also find that he was **390** with his wife at his said seat in Prince George's County on the 25th of June, 1777, the time of the execution of the deed to Bosley, although they should find that he, with his wife, on the said last mentioned day, stopped at Belle-Air, his temporary residence in Prince George's County, for a short time only, on their way to or from West River, in Anne Arundel County, and during such continuance executed and acknowledged the deed to Bosley; and that Ogle, with his wife, immediately after the execution and acknowledgment of the deed, left Belle-Air, and did not go thither with his family to remain during a part of the summer and autumn, according to his said custom, until several weeks after the time of executing the deed; that then the deed is good and valid in law to pass and transfer all the interest of Ogle in the land to Bosley.

The Court do not say, that a person going from one county to another can acknowledge a deed for lands laying in a different county; but that a temporary residence, and not a mere transitory residence, is sufficient for that purpose.

The clerk of the County Court is a person intrusted to make the certificate, that the persons, before whom the acknowledgment of the deed was made, were justices of the peace of the county. He had a knowledge of the facts whereupon to ground his certificate, which is to authorize the recording the deed. The Court think a substantial compliance with the directions of the Act is all that is requisite; and the Court consider the words used in the certificate are words of that import. The words legally authorized, are of the same import as "duly commissioned and sworn." The Court consider that the justices could not be legally authorized unless they had been commissioned and sworn.

The Court are of opinion, that the certificate of the clerk of Prince George's County Court, endorsed on the deed from Benjamin Ogle and wife to James Bosley, is good and sufficient in law to warrant the enrolling the deed by the clerk of Baltimore County Court among the land records of that county. The defendant excepted.

4. The second bill of exceptions.—The defendant, to make title to the lands within the lines from figures, &c. on the plots in the cause, offered evidence to prove the plots and explanations; and gave in evidence the certificates \* and patents (a) of the tracts of **391** land called Cullen's Lot and Cullen's Addition; the certificate of the former tract dated the 17th of June, 1683, and of the latter tract dated the 25th of September, 1683; and also gave in evidence the certificate and patent of Hill's Forest before mentioned. And also gave in evidence, that the whole of the land contained within the lines on the plots from 60, shaded blue, to red 7, to red 8, to red 9, to 61, and with the fence shaded yellow to 60, was in the actual possession, enclosure and cultivation, of the defendant, and those under whom he claims, claiming the whole thereof as his and their property for the space of fifteen years, and that then a fence was made from red 7 to X, and from X to 60, and the whole of the land included in the fence from X to red 7, red 8, red 9, to 61, to 60, to X, was continued for seven years as the fence and the inclosure of the defendant, claiming the same as his own before the bringing this ejectment. In this case the testimony was, that the fence from 60 to 52, to 53, and so on to 60, was made by the defendant, and those under whom he claims, before the year 1774, and continued to run thus until the year 1783, when the fence was altered, and run from 60 to red 7, 8, 9, black 61 to 60; that this last fence from red 7, 8, 9 to 61, was in the year 1782 put up by those under whom the plaintiff claims, and those under whom the defendant claims, jointly; that in the latter part of the year 1782, or beginning of the year 1783, the plaintiff, and those under whom he claims, put up the fence running from red 7 to X, as a fence belonging to Hill's Forest, and the owners thereof; that immediately after, in the year 1783, the defend-

(a) Neither of the tracts were patented.



ant removed the fence from 60 to red 7, and run the same across to X, and joined the same to the fence so made by tiff from red 7 to X. The defendant thereupon prayed the opinion of the Court, and their directions to the jury, that if they of the Court, and their directions to the jury, that if they opinion from the evidence, that the defendant, and the whom he claims, have held by enclosure and cultivation than twenty years, the land included within the lines from 7, and red 8, red 9, to 61 to 60, claiming the same as his, then he has title to the same by adversary possession, before the expiration of the twenty years the fence and \* was removed from red 7 to X, to 60, and thereby enlarged the enclosure.

CHASE, Ch. J. The Court refuse to give the direction being of opinion that if the jury should find that the lessor, under the direction of the Court already given, has title to all the tract of land called Hill's Forest, except the devised to Nathaniel Richardson; and should also find land, to which the defendant claims title by adversary possession herein stated, is included within the true location Forest, that in such case the defendant has no title to the adversary possession, having abandoned it by removing the fences. The defendant excepted.

5. The third bill of exceptions.—The plaintiff to make title land claimed by him in this action, read in evidence to the certificate and patent of Hill's Forest, and showed a title to in the lessor of the plaintiff, under the grantee of the land prove that the said tract is truly located on the plots by his claim and pretensions, gave in evidence the plots, and the of a tract of land called Thompson's Choice, surveyed for Thompson on the 12th of March, 1679, in virtue of a warrant granted him the 14th of January, 1679, and also a warrant granted him the 24th of January, 1679, for 250 acres, "was laid out for the said Thompson a tract of land called son's Choice, lying in Baltimore County, on the Ridge of Gunpowder River. Beginning at a bounded oak, being the westernmost of a tract of land late laid out for Major Sewell, (a) and W. 500 perches to a bounded oak standing by the great road running N. from the said oak 320 perches, then E. 500 perches with a straight line to the first bounded tree, containing out for 1000 acres of land more or less." And also gave evidence to prove, that the land called Thompson's Choice is truly located on the plots. He also offered evidence to prove the location of Thompson's Choice to be from the letter Q on the plot from thence to R, to S, to T, to Q. The defendant then offered

(a) Called Sewell's Fancy.

dence to prove, that the true location of the said land was from I, thence to 10, to 11, to 12, to I. There was no evidence given **393** \* that Thompson's Choice was ever run, held or claimed, by any person interested in the said land, as running from its beginning to Gunpowder River, except so far as relates to the field at the figures 10 on the plots, which field was laid down and proved by the plaintiff as an ancient possession under the title of Thompson's Choice. The defendant then prayed the opinion of the Court, and their direction to the jury, that inasmuch as no evidence has been given of the bounded tree called for by the certificate of Thompson's Choice, at the end of its first line, nor of the place where the tree stood, the first line must, according to, and by virtue of the expressions in the certificate, be run so as to terminate at the great falls of Gunpowder River, from whence the remaining courses of the land must be run according to the courses and distances expressed in the certificate thereof.

CHASE, Ch. J. The Court refuse to give the direction as prayed. The Court are of opinion, and so direct the jury, that the expressions of the certificate of Thompson's Choice, as to the termination of the first line thereof, do not operate to bind that line to terminate at the great falls, although no evidence be given of the tree or of the place where it stood. The defendant excepted.

6. The defendant offered in evidence the declarations of Col. Young, deceased, then seized of Sewell's Fancy, to prove the end of the first line of that tract, which is the beginning of Thompson's Choice located by the defendant.

CHASE, Ch. J. The Court reject the declarations offered in evidence. Sewell's Fancy not being located on the plots; and although the second line of that tract runs off from Thompson's Choice, yet *non constat* that Young was not attempting to carry back the first boundary or beginning of Sewell's Fancy, or thus interested.

Verdict.—“The jury find for the plaintiff, and say that the true location of Hill's Forest begins at T. and runs to U, thence to V, thence to W, thence home to T. They further say the true location of Cullen's Lot begins at A, and runs to B, thence with the manor line to C, thence to I, thence home to A. That Cullen's Addition begins at C, standing on the manor line, then runs to D, to G, to **394** \* H, thence home to C; and lastly, they find for the plaintiff all the lands called Hill's Forest, as above located, which lies clear of the lands called Cullen's Lot, and Cullen's Addition, as above located, and which lies to the eastward of the said division line between the plaintiff's lessor and Joseph Slee, from red B to red A continued, until it intersects the out line of Hill's Forest as above located.” Judgment.—That the plaintiff recover against the defendant “his term yet to come and unexpired of, in and unto, all

that part of the tract of land called Hill's Forest, situate in Baltimore County aforesaid, located upon the plots returned in this cause, beginning at the letter T, and running to U, thence to V, thence to W, and thence home to T, which lies clear of the land called Cullen's Lot, also located upon the said plots, beginning at A and running to B, thence with the manor line to C, thence to I, and thence home to A, and which lies also clear of the land called Cullen's Addition, also located on the said plots, beginning at C, standing on the manor line, then running to D, then to G, then to H, and thence home to C, and also which lies to the eastward of the division line between James Gittings, the lessor of the plaintiff, and Joseph Slee, from red B to red A continued, until it intersects the out line of the said land called Hill's Forest as above located, so as aforesaid by the jurors aforesaid found," &c. On this judgment the defendant brought a writ of error returnable to this Court.

The cause was argued at the last term, before BUCHANAN, NICHOLSON, and GANTT, JJ.

*Key, Harper and Johnson*, (Attorney-General,) for the plaintiff in error. On the second bill of exceptions, stated that the principle established by the General Court, in their opinion given in this bill of exceptions was, that if a man has a parcel of land under inclosure for 15 years, and then enlarges the parcel, and holds the whole by inclosure for seven years, he did not acquire a title in the first parcel by 20 years possession by inclosure. In opposition to \* which they cited *Russell vs. Baker*, 1 H. & J. 71. On the **395** third bill of exceptions they cited *Howard vs. Moale et al.* (ante, 269, 270.) They objected to the verdict and judgment on two grounds—1. For uncertainty; and 2. For excess over and above the demand—the verdict and judgment being for more land than was claimed in the action. They cited 2 Bac. Ab. tit. *Damages*, (D. 2;) *Ibid*, tit. *Error*, (K. 6;) *Crompton vs. Smith*, Yelv. 5; 1 Bulst. 49; *Clements vs. Waller*, 4 Burr. 2156; *Cuning vs. Sibly*, *Ibid*, 2490; *Parker vs. Harris*, 1 Salk. 162; and *Philips vs. Bury*, 1 Ld. Raym. 6.

*Martin and T. Buchanan*, for the defendant in error. On the points respecting the verdict and judgment, cited 7 Bac. Ab. tit. *Verdict*, (M;) *Co. Litt.* 227 a; *Trials Per Pais*, 298, 304; *Carter's Rep.* 80. 94; *Vin. Ab. tit. Trial*, 407, pl. 29; 2 Roll. Ab. tit. *Trial*, 707, pl. 42; 2 Bac. Ab. tit. *Ejectment*, (F;) the Act of 1805, ch. 65, s. 44; 1 *Tidd's Pr.* 662, 663; *Sullivan vs. Seagrave*, 1 Stra. 695; 2 Bac. Ab. tit. *Ejectment*, (D. 2.) 419, 420; *Cottingham vs. King*, 1 Burr. 629; *Conner vs. West*, 5 Burr. 2673; and *Howard vs. Moale et al.* (ante 249.)

THE COURT, at this term dissented from the opinions of the General Court in the first and second bills of exceptions, and concurred with that in the third bill of exceptions. But the Court were

of opinion, that the certificate of the clerk of Prince George's County Court gave an authority to the clerk of Baltimore County Court to record the deed from Ogle and wife to Bosley, mentioned in the first bill of exceptions, the Court considering the words "legally authorized and assigned," within the meaning of the Act of November, 1766, ch. 14.

*Judgment reversed.*

### BRYDEN vs. TAYLOR.

A special authority must be strictly pursued. (a)

Where a person acted in the character of a Justice of the Peace, although he did not so style himself, yet it is *prima facie* evidence that he had authority to act as such. (b)

A permanent residence of a witness is not necessary for the purpose of taking his deposition under the Act of July, 1779, ch. 8, to perpetuate testimony; but a temporary or transient residence is sufficient. The fact of residence need not be placed on record. (c)

What is alleged as a motive or inducement in the deposition made by a witness, may be read in evidence.

The minutes of the proceedings of a notary public of a foreign country, are to be considered as records, under the courtesy of nations; and a copy under the hand and notarial seal of a notary is sufficient evidence of the protest of a foreign bill of exchange. (d)

Where a person was frequently seen in the counting house of the plaintiff, transacting business as a principal, and was generally supposed, believed and understood in the town, to be a partner in the house of the plaintiff, held not sufficient evidence to prove that such person was a partner of the house of the plaintiff. (e)

In *assumpsit* on a foreign bill of exchange the plaintiff is to recover as much money as will, at the time of the verdict, purchase a similar bill.

**ERROR to the General Court.** The defendant in error brought an action of *assumpsit*, upon a foreign bill of exchange, drawn on the 23d of July, 1799, by C. F. C. Bescke, of Baltimore, on J. A. & D. H. Rucker, of London, in favor of Wm. B. Magruder, for £230 sterling money, and payable 60 days after sight. The bill was endorsed by Magruder to the defendant, (now plaintiff in error,) and by him endorsed to the plaintiff below. It was protested for non-acceptance on the 14th of September, 1799, and for non-payment on the 16th of November, 1799. The general issue was pleaded.

1. The first bill of exceptions.—The plaintiff at the trial at May Term, 1805, to prove that he had given to the defendant due notice

(a) See *Cockey vs. Cole*, 28 Md. 276.

(b) Cf. *Byer vs. Etnyre*, 2 Gill, 150.

(c) Cited in *Carroll vs. Tyler*, 2 H. & G. 157, and *Fouke vs. Fleming*, 13 Md. 409.

(d) Cf. *Patterson vs. Ins. Co.* 3 H. & J. 71.

(e) Cited in *Mitchell vs. Dall*, 2 H. & G. 172.

of the non-acceptance of the bill of exchange, on which the suit was brought, and of the protest for such non-acceptance, offered in evidence a deposition, which, together with the several endorsements thereon, and certificates thereto annexed, was as follows: "Baltimore, 3d March, 1803. During the absence of William Taylor from Baltimore, I received Francis Brown's letter directed to him in November, 1799, which letter was dated the 13th of September, 1799, containing advice of C. F. Bescke's bills, 23d July, 1799, for £230 and £120 sterling, on J. A. & D. H. Rucker, London, being protested for non-acceptance, of which I duly notified James Bryden immediately. In the month of February, 1800, immediately on receipt of the news that the bills were protested for non-payment, I returned in the brig John Brickwood, from London, (which appears by Francis Brown's letter of 21st November, 1799.) I notified James Bryden thereof by order of William Taylor, and immediately subsequent I heard various conversations between William Taylor and James Bryden on the subject. The second set which W. Taylor wrote for to England, as soon as it was believed the John Brickwood was lost, arrived at Baltimore in September, 1800, enclosed in Francis Brown's letter of 28th June, 1800, while W. Taylor was out of town, I was then his agent and in town. Immediately on receipt of the bills I called at James Bryden's, but did not find him; I called again very shortly afterwards and demanded payment for the said bills of the said James Bryden, from whom I could get no satisfaction. In \* confirmation of the loss of the John Brickwood, I have examined the journals of the Marine Insurance office of this city, and find the following entry under date of the 9th December, 1800: "The Marine Insurance Office, Dr. to D. Stewart & Sons. For total loss on brig John Brickwood, insured the 10th of January last, on policy No. 504, she having sailed from the Downs the 10th December, 1799, and no account of her since—it is concluded she has foundered."

WILLIAM O. PAYNE.

Sworn to before me, by William Osborn Payne, on Thursday the 3d of March, 1803, at 4 o'clock in the afternoon, at my office in the City of Baltimore.

OWEN DORSEY.

To James Bryden. Take notice, that I shall attend at the office of Owen Dorsey, Esquire, in the City of Baltimore, on the third day of March next, at the hour of 4 o'clock post meridiem, to take the deposition of William O. Payne, to be read in evidence in two suits brought by me against you in the General Court for the Western Shore of Maryland.

WM. TAYLOR.

February 8th, 1803.

Between the hours of twelve and one o'clock P. M. on Wednesday the 9th of February, 1803, I delivered to James Bryden, at his dwelling in Light Street, Baltimore, a true copy of the within notice.

WM. Y. LEWIS.

Sworn to before me the 3d March, 1803.

OWEN DORSEY.

Received to be recorded, the 19th day of May, 1804. Same day recorded and examined. W.M. GIBSON, Clk."

The whole was certified under seal of office by the clerk of Baltimore County Court. The plaintiff also gave in evidence, that W. O. Payne, in the deposition mentioned, was dead. The defendant objected to the reading of the deposition in evidence.

CHASE, Ch. J. The Court accede to the principle that special authorities must be strictly pursued. But they are of opinion, that it appears upon the face of the deposition that it has been properly taken.

**398** \* The Court are of opinion, that the Act of Assembly of July, 1779, ch. 8, entitled, "An Act establishing a mode to perpetuate testimony," does not require an efficient residence, such as would make a person a domicil, qualify him to vote or to be capable of holding an office; but a temporary or transient residence is sufficient; and it appears to the Court, that the requisites of the said Act of Assembly has been complied with.

The witness being in the county at the time the deposition is taken, is alone necessary; unless it were so, no person but a Judge of the General Court would be competent to take the testimony of transitory witnesses.

The twenty days notice is not only for the purpose of giving the opposite party time to appear, but to inquire into the character of the witness.

The Act of Assembly does not require the fact of residence to be put upon record. The defendant excepted.

2. The defendant objected to the reading that part of the deposition which states that the deponent, as clerk of the plaintiff, received letters directed to the plaintiff stating the protest, in consequence of which he gave notice to the defendant as indorser of the bill of exchange.

CHASE, Ch. J. That part of the deposition is only inducement—Let it be read.

3. The second bill of exceptions.—The plaintiff, to prove that the bill of exchange in the declaration mentioned was duly protested for non-acceptance, offered in evidence a paper purporting to be an extract under notarial seal from the books of the notary by whom the said protest was supposed to have been made: "Extract from the protest book marked C, fol. 440, begun the 2d of June, 1798, and ended the 8th of November, 1799, formerly belonging to David Guillonneau, late of Pope's Head Alley, London, notary public, deceased, and now in the possession of his successor, Benjamin Newton, of the same place, notary public.



more, where the business of the house of William Taylor was carried on, and was frequently seen in the counting house of William Taylor, transacting business, receiving applications, and giving answers as a principal in the business, and was generally supposed, believed and understood, in Baltimore, to be a partner in the house of William Taylor. And it also appeared in evidence, that John Taylor, for several years before the drawing and endorsement of the said bill of exchange, resided in London, and there carried on business under the firm of John Taylor & Co., and that at the times of the drawing and endorsement of the bill, John Taylor had recently come from London to this State, in bad health, and did not remain in this country longer than 12 or 18 months, when he returned to London; and that during a part of his stay in this State, and at the times of the drawing and endorsement of the bill, he resided at a country seat rented by him in the neighborhood of Baltimore; and that William Taylor did then, and for a long time before and afterwards, carry on trade and business in Baltimore in his own name alone, and not in the name of William Taylor & Co., or in the names of William and John Taylor. The defendant then prayed the opinion of the Court, and their direction to the jury, that if they shall be of opinion from the evidence so offered, that John Taylor was at the times aforesaid a partner in the house of William Taylor, that the plaintiff is not entitled to recover in this action.

CHASE, Ch. J. The Court are of opinion, that the evidence offered is not sufficient to prove that John Taylor was a partner in the house of William Taylor, and therefore they refuse to give the direction prayed. The defendant excepted.

5. A question arose as to the value of the sum of money mentioned in the bill of exchange, whether such value \* under the Act of **401** 1785, ch. 38, should be at the time of the protest or at the time of the notice? It was stated by the Attorney-General, that the Circuit Court had decided, that the plaintiff might recover as much money as would purchase a new bill at the time of the verdict.

THE COURT said, that it had been often decided in this Court, under the Act of 1785, ch. 38, that the plaintiff is to recover as much money as will purchase a similar bill at the time of the verdict.

The verdict and judgment being for the plaintiff, the defendant brought the present writ of error.

The case was argued before POLK, BUCHANAN, NICHOLSON, and EARLE, JJ.

*Harper and Purviance*, for the plaintiff in error, referred to the Act of July, 1779, ch. 8, s. 1, 2, 7, and the decisions of this Court upon the acknowledgments of deeds by *femes covert* grantors. *Evans*



vs. *Bonner*, 2 H. & McH. 377; Acts of 1729, ch. 8, s. 5; 1763, ch. 13, s. 2; 1796, ch. 43, s. 14; *Const. Art.* 2, 15; *Stevenson vs. Myers*, 1 H. & J. 102; *Gordon vs. Hickman*, 4 H. & McH. 217; *Gittings vs. Hall*, 1 H. & J. 16; and *Gassaway vs. Dorsey*, 4 H. & McH. 405.

\* *Martin*, for the defendant in error, cited *Sim & Lee vs. Deakins*, 2 H. & McH. 46; *Gittings vs. Hall*, 1 H. & J. 18. The 402 Acts of July, 1779, ch. 8, and July, 1721, ch. 14; *Carroll vs. Norwood*, 4 H. & McH. 287; *Ex parte Bollman & Swartwout*, 4 Cranch, 75; *Walron*d vs. *Van Moses*, 8 Mod. 322, 323.

THE COURT were of opinion, that there was no error in the opinions expressed by the General Court in the several bills of exceptions.

*Judgment affirmed.*

### DORSEY vs. GASSAWAY.

The admissions by counsel of certain facts in a special verdict taken at a former trial between the same parties in the same action, are not evidence at a new trial of the same cause. (a)

If slaves remain in the possession of the vendor, the bill of sale must be recorded; and whether they remained in his possession, is a matter of fact for the jury; if they find they were not in his possession, the bill of sale is not required to be recorded; and it is not evidence, although it was recorded, unless the execution of it is proved. (b)

To lay the foundation for proving an original deed lost, the evidence must be given to the Court. (*Note.*)

Proof being made of the loss of an original deed of mortgage of land and slaves, dated in 1763, the *insperimus* was admitted to be read as legal evidence, although the deed was not recorded in the manner prescribed by law, so far as respected the slaves in dispute.

Where a deed is lost, or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the deed.

Certain facts refused to be admitted in evidence to prove, that a person who purchased certain slaves, and had made a voluntary gift of them, never paid any consideration for the slaves.

Certain acts and declarations of the defendant, subsequent to his sale of the slaves for which an action of replevin was brought, and before his insolvency, are not evidence to defeat the claim of the plaintiff. (c)

(a) In *Woodruff vs. Munroe*, 33 Md. 146, it was ruled that depositions taken under a foreign commission and by agreement used at the trial of a cause, are admissible in evidence when the same cause is tried under a *procedendo*, the agreement not limiting the use of the testimony to the first trial. See *Mahoney vs. Ashton*, 4 H. & McH. 193; *Gassaway vs. Dorsey*, Ib. 254.

(b) See *Alex. Br. Stat.* 882.

(c) Affirmed in *Kerby vs. Kerby*, 57 Md. 361, and in *Reese vs. Reese*, 11 Md. 558, where it was held that the declarations of a grantor, after the execution of a deed, impeaching the title of the grantee therein, are inadmissible in evidence.

An affidavit made by a debtor, and payment into the treasury under the tender law, admitted in evidence to prove the person was indebted, and made the payment into the treasury.

Proceedings in Chancery under an insolvent law, are not evidence in favor of the person who had obtained the benefit of that law, to prove an acknowledgment and admission by him on his application for the benefit of that law.

A bill in Chancery, with all the proceedings and decree thereon, cannot be read in evidence in an action between different parties from those named in the proceedings. (a)

An answer in Chancery, made by the respondents from information derived from the present defendant, is not admissible in evidence. But the declarations of the defendant are admissible evidence; and a witness may recur to the answer to refresh his memory as to the declarations made to him by the defendant.

No person will be permitted to disaffirm his own sale. He cannot set up his discharge under an insolvent law, to disaffirm his prior acts. (b)

If a mortgage of slaves was subsisting, and the mortgagor claiming the absolute ownership of them, sold them for a full consideration, although as to the mortgage, the sale would transfer only the equitable interest, yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee, and notwithstanding the after discharge of the vendor, under an insolvent law, and his purchase of the slaves from the mortgagee, his subsequent acts, in perfecting his title to the slaves, will enure in law to confirm, and not to defeat, his contract with the vendee.

If a debt is due on mortgage and on open account, and partial payments are made by the debtor, without any application, the law will apply the payments to the mortgage debt. (c)

Declarations made by the defendant before and after his discharge under an insolvent law, may be given in evidence against him.

Payments made by a mortgagor are not to be applied to discharge a debt due on the mortgage, in favor of a purchaser of part of the property mortgaged, who had not paid for it, and who had made a gift thereof to his son, to defraud his creditors.

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(a) In *Key vs. Dent*, 14 Md. 86, certain exceptions to the general rule that judgments and decrees are evidence only between the parties and privies are pointed out. A decree and the proceedings in a Chancery cause are admissible, though between strangers, to show *rem ipsam*. The production of such a record is proof that the suit was brought and recovery had as therein set forth, but the consequences to others, resulting from those facts apparent from the face of the record are to be established by proof of such other facts as may be necessary.

(b) Cited in *Bush vs. Person*, 18 Howard, 82, where it was held that when a party mortgages land on which there is a prior judgment lien, is subsequently discharged in bankruptcy, and then purchases the property at a sale under the prior judgment, he is estopped to set this up as a superior title to the mortgage, in which was the implied covenant of warranty against that judgment. Cf. *Funk vs. Neucomer*, 10 Md. 301.

(c) Affirmed in *Laeber vs. Langhor*, 45 Md. 482; *Neidig vs. Whiteford*, 29 Md. 185; *McTavish vs. Carroll*, 1 Md. Ch. 163. See *Guinn vs. Whitaker*, 1 H. & J. 754, note; *Suter vs. Ives*, 47 Md. 520.

In an action of replevin, the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained.

APPEAL from the General Court. The present was an action of replevin, brought by the appellee for two negro \* slaves, James and Henry. The defendant, (the present appellant,) **403** pleaded *non cepit* and property. General replication and issues joined. There had been a trial in this case in the General Court at October Term, 1799, and judgment having been rendered for the defendant, the plaintiff appealed to the Court of Appeals, where the judgment was reversed, and a *procedendo* awarded for a new trial. See 4 H. & McH. 405.

1. The defendant at the new trial at October Term, 1805, offered in evidence to the Court, the admissions made by the plaintiff's counsel in the special verdict taken, at the former trial at October Term, 1799, to prove the existence of the mortgage therein stated.

*Mason*, for the plaintiff, objected to this being done, and cited *Mahoney vs. Ashton*, 4 H. & McH. 295, 322.

CHASE, Ch. J. Facts are often admitted and stated for the purpose only of bringing a particular point of law before the Court. As the finding of the jury, in the special verdict, was on the admissions of counsel, it is not evidence to prove the existence of the mortgage.

2. The defendant offered in evidence a bill of sale, for the negroes mentioned in the declaration, from Clerke, administrator of Russell, to Edward Dorsey, one of the original defendants in this action.

*Mason*, for the plaintiff, objected to the bill of sale's being read, unless its execution was proved.

CHASE, Ch. J. If the negroes remained in the possession of the vendor, the bill of sale is required to be recorded; and whether the negroes remained in the possession of the vendor, is a matter of fact for the jury; and if they find they were not in possession of the vendor, then the bill of sale is not evidence, although it has been recorded, without proof of its execution, it not, in such case, being a paper authorized by law to be recorded.

3. The first bill of exceptions.—The plaintiff offered in evidence that the defendant, in the year 1782, being in possession of a number of negroes, sold them at public sale to the highest bidder; that at that sale Thomas Gassaway, the father of the plaintiff, purchased negro James in the declaration mentioned, and negro Rachel, the mother of \* Harry, the other slave in the declaration mentioned; Harry not being then born. That negroes Rachel **404** and James were then delivered by the defendant to Gassaway, who held and possessed them, together with Harry after he was born, until 1789, when he gave negroes James and Harry to his son, the

present plaintiff, and then delivered possession of them to him, who held and possessed them until the year 1796, when they were taken from his possession by the defendant. They were so taken some short time before the bringing of this suit. The plaintiff then proved that James Russell, hereinafter named, was in the (now State,) then Province of Maryland, in and during the year 1772. The defendant then offered evidence to the Court (a), by the oath of Robert Young, that he was some years past the agent of James Russell, of Great Britain, and that as his agent he was in possession of a mortgage executed by the defendant to Russell; that the mortgage bore date in the year 1763. That he was well acquainted with the defendant and his hand-writing, and that the mortgage was signed by the defendant. That he does not remember whether the mortgage was acknowledged before any Judge or Justice. That it was an original paper, and that to the best of his recollection, he delivered it, about 10 or 12 years ago, to James Clerke, then the administrator of Russell, who had died before that time in G. B. The defendant then read to the Court the letters of administration granted to James Clerke on Russell's estate, dated the 11th of August, 1789. He further proved by Young, that the mortgage purported to be a conveyance of a number of negroes by name from the defendant to Russell, and amongst those negroes were two, to wit, Sampe and Cato. He further proved to the Court by the testimony of Charles Walker, that Russell shipped large quantities of goods, before the year 1763, to the defendant, and that Charles Grahame was the agent of Russell. That he was present, between the years 1760 and 1765, when Grahame, now deceased, and William Lux, now deceased, and the defendant, were together in the counting-room of Lux, at which time the defendant executed some instrument of writing, which Walker witnessed, and that he never witnessed any other  
 \* executed by the defendant, in the presence of himself and  
**405** Lux. He further offered in evidence to the Court, by Young, that the original mortgage, hereinbefore referred to, was delivered by him to Clerke, about the year 1797, for the purpose of sending the same to Philadelphia, to lay before the commissioners there in session, under the treaty with Great Britain, to establish the claim of Russell. He further offered in evidence to the Court, by Edward Hall, that Clerke, the administrator of Russell, in a conversation with him lately, informed him that all the papers, delivered to him, Clerke, by Robert Young, relating to the claim of Russell against the defendant, were by him delivered over to William Cooke, Esquire, to prosecute his claim before the commissioners in Philadelphia. He then read in evidence to the Court the deposition of William Cooke, Esquire, taken by consent, who proved, "that some years ago he was applied to by James Clerke, administrator of James Russell,

(a) CHASE, Ch. J. To lay the foundation for proving that an original deed is lost, the evidence must be to the Court.

late of London, merchant, to file a bill in Chancery against Dorsey, and Luther Martin, Esquire, and others, the bargain of certain lands which they purchased of Dorsey, and which were previously mortgaged to Russell; that among the papers lodged to him by Clerke, were several bonds passed by Dorsey to Russell, but the deponent cannot recollect whether the original mortgage, or a copy of it, was delivered to him. That he filed the bill in Chancery, and while the suit was depending, he was applied to by Dorsey, now deceased, to purchase sundry negroes, also included in the mortgage, and after consulting the complainant, they agreed that the negroes should be valued by disinterested persons, which was done, and he sold the negroes at the valuation to Dorsey, and received from him, or from some other person on his behalf, the purchase money for the negroes, and paid the same over to the complainant. That it being afterwards ascertained that Dorsey had not the legal title to the lands, or to some material part of them, at the time of executing the mortgage, the deponent presented a claim on behalf of Clerke, the administrator, to the commissioners then sitting at Philadelphia under the treaty of amity, commerce, &c. between Great Britain and America, and withdrew all the original papers which he had lodged in the Court in the said suit, and sent them, together with a memorial on behalf of the administrator, to the commissioners, in order to obtain compensation for the money paid by John Dorsey, into the treasury of the United States, towards satisfaction of the mortgage and several other claims. That he cannot charge his memory with the particular contents of the memorial, and filed with the memorial in the office of the commissioners, nor has he any recollection that any document was presented to substantiate the claim. He has since searched among the papers, and cannot find either bond or mortgage from John Dorsey or Russell in his possession, and that whatever papers were lodged with the commissioners, he the deponent has heard and believed to have since been removed to Great Britain; and from his not being able to find any of the said papers, the deponent believes they were lodged by him with the commissioners, and are now in their possession in Great Britain."

The foregoing evidence was offered by the defendant in support of his foundation for proving that a deed of mortgage for certain lands was executed by the defendant to James Russell in 1763, under which through which the defendant claimed the negroes for whose present suit is brought, and that the deed of mortgage is now in the power, possession or control, of the defendant. The defendant produced an original record book, one of the land records of the General Court, and offered to read to the Court and jury the contents of the deed, found on the records of the said Court, of the deed of the defendant to Russell, dated the 6th of December, 1763, and a marginal entry in the record book, stating said deed to be e-

as evidence of the contents of the original deed of the mortgage, proved to have been executed by the defendant to Russell in 1763. To the reading of this paper from the record book, as evidence, the plaintiff objected.

*Shaaff, Mason and Johnson*, for the plaintiff, cited 1 *Morg. Ess.* 159, 160; *Page's Case*, 5 *Coke*, 54; *Style*, 445; *Trials Per Pais*, 355, 434; *Eden vs. Chalkill*, 1 *Keb.* 117; *Cheney vs. Watkins*, 1 *H. & J.* 527; *Hall vs. Gittings*, (*ante* 380;) *Peake's Evid.* 97, 110; and *Bull. N. P.* 255, 256.

*Martin*, (Attorney-General,) and *Key*, for the defendant, cited *Hall vs. Gittings*, (*ante* 380;) *Peake's Evid.* 96; and 1 *Morg. Ess.* 161.

**407** \* CHASE, Ch. J. The question before the Court now, is different from what it was on the former trial. Here the defendant has laid a foundation whereon to authorize the *insperimus* of the deed to be read; and the question is, what other kind of evidence will be sufficient for that purpose?

Where a deed is lost or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the paper.

The Court consider the *insperimus* in this case to be a true copy. The clerk had authority to record the deed as to the real estate, and the copy is good as to the real estate. If it is a true copy as to the land, it is equally so as to the personal estate. The Court consider it the next best evidence to the deed itself, and far preferable to parol proof.

This case is distinguishable from that of *Cheney vs. Watkins*. In that case there was no question about the *insperimus* of the deed, that the Court recollect of.

In the case of *Gittings vs. Hall*, it was *insperimus* of an ancient deed which needed no recording, and where the clerk had no authority to record it; but as the possession had gone with the deed, it was on those two grounds read.

The Court are of opinion, that the *insperimus* of the deed of mortgage, from the defendant to James Russell, is legal evidence, and admit the same to be read in evidence to the jury. The plaintiff excepted.

4. The second bill of exceptions.—The defendant then read in evidence an affidavit, (on the files of the treasury,) made by him on the 18th of May, 1781, before Allen Quynn, Esquire, a justice of the peace of Anne Arundel County, [See 2 *Harr. Ent.* 250, and the Act of October, 1780, ch. 5, s. 11.] He also read in evidence the entry in the books of the treasurer, of the payment into the treasury by him, the defendant, on account of a debt due to James Russell. [See 2 *Harr. Ent.* 250 and 251, and the Act of October, 1780, ch. 5, s. 11.] He also produced and offered to read the record and proceedings in

the Court of Chancery on his obtaining the benefit of an Act of Insolvency, to prove that William M'Laughlin and Archibald Moncreiff, were duly \* appointed his trustees. (a) He also offered in evidence, that M'Laughlin and Moncreiff respectively **408** accepted of the trust, and that M'Laughlin died about the year 1795, and that Moncreiff survived him; and also offered to read in evidence, from the records of the General Court office, certain entries of a suit brought in that Court in the year 1797, by Moncreiff, as surviving trustee of the defendant, against Thomas Gassaway, and the renewals thereof. He also offered to read in evidence the record and proceedings in the Court of Chancery in 1797, of Thomas Gassaway's having applied for and obtained the benefit of an insolvent law, in order to prove that Thomas Gassaway never paid any consideration for the negroes before his voluntary gift of them to his son, the plaintiff, nor at any time since. (b)

CHASE, Ch. J. The Court refuse to admit the above facts to be given in evidence to the jury, to prove that Thomas Gassaway never paid any consideration for the negroes before his voluntary gift of them to his son, the plaintiff, nor at any time since; the Court being of opinion, that the acts and declarations of the defendant in this case, subsequent to the sale by him to Thomas Gassaway, and whatever was consequent thereon, are not evidence to defeat the claim of the plaintiff. But the Court are of opinion, that the affidavit and payment into the treasury, by the defendant in 1781, prior to the sale by him to Thomas Gassaway, are admissible evidence to prove the defendant was indebted to James Russell, and made the payment into the treasury in the manner therein stated. The defendant excepted.

5. The third bill of exceptions.—The defendant then read in evidence, the affidavit made by the defendant before Allen Quynn, and on the files of the treasury; also the entry in the books of the treasurer, of the payment by the defendant into the treasury on account of a debt due to Russell; and also produced and offered to read the record and proceedings in the Court of Chancery, on the application of the defendant, and his obtaining the benefit \* of an insolvent law, to prove the acknowledgment and admission of **409** the defendant in 1787, that his mortgage to Russell in 1763 was then outstanding unsatisfied. The defendant then prayed the opinion of the Court, and their direction to the jury, that such evidence, though subsequent to the sale of the negroes by him to Thomas Gassaway is competent evidence against Gassaway, or the plaintiff,

(a) The schedule returned, stated that Russell was a creditor, and Thomas Gassaway a debtor.

(b) Gassaway, in his schedule, returned the trustees of the defendant his creditors.

he the defendant then holding and possessing the residue of the mortgaged property, or part thereof.

CHASE, Ch. J. The Court reject the evidence. The defendant excepted.

6. The fourth bill of exceptions.—The plaintiff then produced, and offered to read in evidence, (for the purpose alone of proving that the mortgage from the defendant to James Russell was paid and satisfied before the commencement of the war between America and Great Britain,) a bill in the Court of Chancery filed by James Clerke, administrator of Russell, against Luther Martin, William Buchanan, Archibald Moncreiff, Robert Dorsey, and Wm. H. Dorsey, with all the proceedings, and the decree of the Chancellor thereon. To the reading of which the defendant objected.

CHASE, Ch. J. The proceedings are between different parties, and, therefore, cannot be used as evidence in this case. If the decree had been that the mortgaged debt was unsatisfied, it could not be used against the plaintiff, and the rule must be mutual.

Although the answer is in the hand-writing of the defendant, yet he may have only acted as a clerk. He has not himself sworn to it.

The Court refuse to let the proceedings be read to the jury for the purpose required by the plaintiff's counsel. The plaintiff excepted.

7. The fifth bill of exceptions.—The plaintiff then cross-examined Robert Dorsey, a witness produced on the part of the defendant, and proved by him, that he appeared, together with Archibald Moncreiff and William H. Dorsey, as the trustees of the defendant in this cause, to a bill in the Court of Chancery filed against them by Clerke, administrator of Russell, and made the answer, now produced, to that bill. That he obtained his knowledge of the respective facts, stated in that answer, from the \* defendant in this cause, and from  
**410** his books, and that the answer is in the hand-writing of the defendant in this cause. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that if the jury are satisfied, from the evidence, that the respondents, named in the said answer, obtained their knowledge of the facts stated therein from the defendant, and the answer is in the hand-writing of the defendant in this cause, that then the answer is evidence to prove the mortgage debt had been discharged as is stated in the answer.

CHASE, Ch. J. The Court are of opinion, that the declarations of the defendant are evidence admissible to the jury, and that the witness may recur to the answer to refresh his memory as to the declarations made to him by the defendant. But the Court refuse to allow the answer to be read in evidence to the jury. The plaintiff excepted.



8. The sixth bill of exceptions.—The plaintiff then offered in evidence, by the testimony of Robert Dorsey, that the contract and purchase made by Edward Dorsey, with and of William Cooke, Esquire, of the negroes mentioned in the declaration, as stated in the deposition of Cooke, was made by Edward Dorsey, at the request and for the benefit of the defendant, and that the money or price paid to Cooke for the slaves, was the money of the defendant; that Edward Dorsey, or his estate, he being dead, have no interest in the slaves, but that the defendant is the only person claiming under the purchase from Cooke. The defendant further offered in evidence, that he purchased the negroes in controversy in 1796, through Edward Dorsey, from Clerke, the administrator of Russell; that the negroes were sold by the defendant to Thomas Gassaway, under whom the plaintiff claims, in 1782. And to prove that he the defendant, between 1782 and 1796, obtained the benefit of an insolvent law, he produced in evidence the insolvent law passed at April Session, 1787, ch. 34; and also produced and read in evidence the record, proceedings, and release of him the defendant, under that insolvent law. He further offered in evidence, that the negroes in controversy are the descendants of negro Rachael, included in the mortgage from the defendant to Russell, and said, as before stated, by the defendant to \* Thomas Gassaway in 1782. The plaintiff then prayed the Court for their opinion and direction to **411** the jury, that if from the evidence the jury are satisfied that the purchase of the negroes named in the declaration made by Edward Dorsey, as stated in the deposition of William Cooke, was made by Edward Dorsey, by the authority and direction of the defendant, and for the benefit of the defendant, and that the purchase money paid to Cooke for the negroes was the money of the defendant, that then the plaintiff is entitled to their verdict for the negroes in the declarations named, and damages for the detention thereof.

CHASE, Ch. J. The defendant cannot be permitted to disaffirm his own sale. He cannot be suffered to set up his discharge under an insolvent law to disaffirm his prior acts.

The Court are of opinion, that if the jury find the mortgage was satisfied in the year 1782, when the defendant sold the negroes to Thomas Gassaway, that the plaintiff has a good title to them.

The Court are also of opinion, that if the mortgage was subsisting in 1782, and the defendant sold the negroes, claiming the absolute ownership in them, and for a full consideration, although as to James Russell his sale would transfer only the equitable interest in the negroes; yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the negroes to the vendee, and according to good faith and honesty the subsequent acts of the defendant, in perfecting his title to the

negroes, will enure in law to confirm, and not to defeat, his contract with Thomas Gassaway. The defendant excepted.

9. The seventh bill of exceptions.—The plaintiff then offered in evidence, by the testimony of Robert Dorsey, that he understood from his father, the defendant, since the year 1790, that he had made considerable payments and remittances to Russell, between the years 1763 and 1776, in sterling money, amounting to £3,915 18 2; that Russell's administrator claimed the right to apply the money so paid to the satisfaction of certain debts due from the defendant to Russell, upon open account, contracted after the date of the mortgage, and that the representatives of \* the defendant claimed 412 to apply the payments to the satisfaction of the mortgage. The plaintiff then prayed the Court for their opinion and direction to the jury, that if they are satisfied that the said sums were paid at the times above stated, and there is no evidence to satisfy them that the payments when made were particularly applied to any specified debt, either by the defendant or Russell, that then the law will apply the same to the satisfaction of the mortgage.

CHASE, Ch. J. There can be no doubt but the law will apply the payments to the satisfaction and discharge of the mortgage. The Court give the direction prayed. The defendant excepted.

10. The eighth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that the declarations of the defendant, which are said to have been made by him since the sale made by him to Gassaway, and since the insolvency of him the defendant, cannot be used in evidence by the plaintiff to the injury of the title and interest of Russell, or any other person claiming under Russell.

CHASE, Ch. J. The Court are of opinion, that the declarations of the defendant, are evidence against him. The defendant excepted.

11. The ninth bill of exceptions.—The defendant then prayed the opinion of the Court, and their direction to the jury, that as the defendant only insisted that the mortgage was paid by certain payments being made, which ought to be applied in the first instance to the mortgage in preference of other debts, not because he did not owe more, but that what he paid should be first applied to the mortgage—that the principle, that the payments so made, should apply to the discharge of the mortgage, should only be carried into effect in favor of *bona fide* purchasers having bought and paid for the articles, and not in favor of the plaintiff, whose father had not paid for the negroes by him purchased.

CHASE, Ch. J. The Court are of opinion, that the payments made 413 by the defendant to Russell, if the jury shall find they were made as stated, ought to be applied to the \* discharge and

satisfaction of the mortgage in favor of the plaintiff, unless the jury shall find that Thomas Gassaway made the gift to his son, the plaintiff, to defraud his creditors. The defendant excepted.

12. The tenth bill of exceptions.—The defendant further prayed the opinion of the Court, and their direction to the jury, that unless the jury believe that the mortgage money was satisfied before the sale made by the defendant, or that the plaintiff, or his father, under whom he claims, had paid the purchase money for the negroes to the defendant or Russell, or some person entitled to receive the same, that the plaintiff was not entitled to recover any other than nominal damages.

*Martin*, (Attorney-General,) for the defendant, cited 3 *Bac. Ab. tit. Grant*, (D.) 382; *Walker vs. Constable*, 1 *Bos. & Pull.* 306; *Moses vs. Macferlin*, 2 *Burr.* 1005; and *Esp. N. P.* 101.

CHASE, Ch. J. The jury may give what damages they think the plaintiff is justly entitled to as an equivalent for the injury sustained.

The Court are of opinion, that it is within the province of the jury to ascertain and fix the quantum of damages, as an equivalent for the use of the negroes, according to what they may think right on consideration of the evidence; and that they are not restrained, by any principle of law operating on this case, from the full exercise of their judgment. The defendant excepted.

It was admitted, and it is to be considered as part of the statement in this cause, on which the Court has given its opinions, that James Russell, the alleged mortgagee of the defendant was in the year 1763, a subject of his Britannic Majesty, residing in Great Britain; that in the year 1772 he was in Maryland on a visit, and soon returned to Great Britain, and continued to reside there from the year 1774 to his death in 1787, a subject of the crown of Great Britain; and that on the 4th of July, 1776, the then Province, now State of Maryland, became an independent government, and from that day until the 30th of September, 1783, open war existed between this State and the king of Great Britain.

\* Verdict and judgment for the plaintiff. The defendant appealed to this Court, and on the death of the appellee, his executors were made parties. 414

The questions arising under the second, third, sixth, seventh, eighth, ninth and tenth bills of exceptions, were argued before POLK, BUCHANAN, NICHOLSON, and EARLE, JJ. by *Martin*, for the appellant; *Johnson*, (Attorney-General,) for the appellee.

THE COURT agreed with the General Court in the opinion expressed in the several bills of exceptions taken on the part of the defendant in that Court.

*Judgment affirmed.*

A. H. being entitled to a lot of ground, but ignorant of his right, was induced by the fraud and imposition of the agent of B. B. in 1791, to execute a conveyance to B. B. for the lot for a small consideration. He filed his bill in Chancery in 1798, to have the conveyance vacated, &c. The answers of B. B.'s representative, and the agent, denied all fraud, &c. Decreed, that as it does not appear that a fraud was perpetrated. or if it was, that B. B. was a contriver or privy to, or partaker of it—as the complainant suffered many years to elapse before he filed his bill—as the property hath since been greatly improved and changed, and hath devolved on several representatives—as the argument from convenience ought always to have influence, the complainant is not entitled to recover. Bill dismissed.

APPEAL from the Court of Chancery. The complainant, (now appellant,) by his bill filed on the 20th of April, 1798, stated that George Gordon, being seized of certain lots in fee in George-Town, by his will dated 1766, devised the house and lot No. 48, and the acre of land whereon the old warehouse was erected, in fee to his grandson George F. Hamilton, and lot No. 52, with the warehouses thereon in fee to his grandson Charles E. Hamilton. That after the death of the testator George and Charles respectively entered, &c. That they both afterwards went to sea, and died intestate, leaving Thomas Hamilton their heir at law. That Thomas Hamilton, being seized of the lots devised to George F. Hamilton, died in 1783, without having made any valid testamentary disposition of the lots, his will not having been executed in the manner prescribed by law to pass real estate; and having died intestate as to the lots, the same descended to William Hamilton, who was his eldest son and heir at law. That William Hamilton afterwards died, having made his will in June, 1786, by which the lots are not particularly devised, but if they passed by the expression in the will, it was to the complainant, and who was his eldest son and heir at law. That after the death of his father, the \* complainant resided in Monongalia County, in  
**415** the Commonwealth of Virginia, and that in the year 1791, Brooke Beall, since deceased, (whose father had intermarried with Ruth, one of the daughters of Thomas Hamilton,) well knowing the premises, and that for want of a legal execution of the will of Thomas Hamilton, the lots were the property of the complainant, and intending to defraud the complainant thereof by untrue and deceitful pretences, fraudulently procured Andrew Hamilton, who was named executor in the will of Thomas Hamilton, to repair to the complainant in Virginia, where he resided, and by deceit and fraud to obtain a legal conveyance from him to Beall for the lots; and that Andrew Hamilton, acting by the procurement, and by the

directions and with the consent and knowledge of Beall, falsely and deceitfully alleged and pretended to the complainant, (who was then little more than 21 years of age, and was ignorant and unlettered,) that the will of the complainant's grandfather, Thomas Hamilton, was good and valid in law, only that he had not thereby authorized or empowered him, Andrew, although appointed his executor, to sell the lots; and Andrew further informed the complainant, that he must give him a power of attorney for the purpose of acknowledging a conveyance from the complainant to Beall of the lots, which Andrew said he had consented to sell to Beall, under the will of Thomas Hamilton, or that the complainant must go to Maryland to execute and acknowledge the same, or that he (Andrew,) must apply to the Governor and Council of Maryland for an order to sell the lots, under a late Act of Assembly of that State, which Andrew falsely alleged to have passed, and that the complainant therefore would be obliged to attend at Annapolis to make valid the sale. That the complainant, being young and unlettered, and placing confidence and belief in what Andrew, in behalf and by the procurement of Beall, falsely told him, and fearing that he must either execute a conveyance for the lots, or be subjected to the expense and inconvenience of attending at Annapolis, as Andrew had falsely and deceitfully told him he must do, and being likewise without money, and his mother then ill in bed, and depending on him for assistance and support, he was induced to execute, and did, on the 7th of February, 1791, execute a conveyance to Beall for the lots before mentioned, for the trifling \* consideration of three pounds ten shillings current money, which is all that he received, and which he would by no **416** means have accepted as a consideration for the lots, but for the imposition practised on him as before mentioned. That after the execution of the deed, to wit, in 1793, Beall died seized of the lots, and intestate, leaving a widow and seven children, to whom, by law, his real estate equally descended, to wit, &c. the defendants. Prayer, that the conveyance may be set aside and rendered null and void, &c. and for further and other relief.

The answers of the defendants, (one of them being an infant answered by his guardian for that purpose appointed,) admitting certain facts set forth in the bill, and their ignorance of others, stated, that Thomas Hamilton, claiming to be heir at law of Charles E. Hamilton, conveyed that part of lot No. 52, which was devised to Charles by Gordon, to John Orr, who afterwards conveyed the same to Brooke Beall, the ancestor of the defendants. That after the death of Thomas Hamilton, his executor Andrew Hamilton, offered to sell to Brooke Beall the lots which is the object of the bill of complaint, but on examination it was found that there was a defect in the title, and it was agreed between Andrew Hamilton and Beall, that if a good and complete title could be procured for the lots, he,

Beall, would become the purchaser; whereupon Hamilton agreed to procure a title, and obtained the deed mentioned in the bill from the complainant to Beall, and Beall paid to Hamilton for the lots £700 or £800. The defendants deny that Beall ever did in any manner advise, or through false pretences persuade the complainant to convey the lots, nor do they believe that Andrew Hamilton took any undue means to effect that end. They refer to the conveyance, and pray that it may be taken as part of their answer; and Beall being a purchaser for a valuable consideration, without fraud, they contend, that neither him, nor his heirs, ought to be disturbed in their rights. That the complainant never did, as they are informed and believe, make any claim to the lots either of Beall, in his lifetime, or of his heirs since his death, until the present application; and they are ignorant of any fraud ever having been practiced on him. That since the purchase, on the faith thereof, Beall made valuable improvements, &c. The answer of Andrew Hamilton, also one of the defendants, \* stated, among other things material  
**417** to be noticed, that as executor of Thomas Hamilton, not knowing of any defect in the title, he advertised the lot or acre of ground, whereon the old warehouse formerly stood, for sale, and on the 3d of January, 1791, exposed the lot at public sale, where there were several bidders, and among others Brooke Beall, and it was fairly struck off to him, as the highest bidder, for £225. That after the sale, the title papers were by the defendant put into the hands of Beall, to prepare the conveyance. That it was discovered by Beall that the will of Thomas Hamilton was defective, there not being three witnesses to it, and on that account the legal estate had descended to the complainant, who was the heir at law of William Hamilton. That Beall refused to pay the purchase money until the title of the complainant could be obtained, either to himself directly, or to some person who would convey to him; that Mr. Gantt was consulted as counsel, and he advised the making of a deed to Beall directly from the complainant, as the most proper mode of securing the title, and a deed was prepared by Mr. Gantt, for which the defendant paid him. The defendant afterwards, in February, 1791, went to Virginia, where the complainant then resided, and carried with him the deed so prepared, and a copy of the will of Thomas Hamilton. That the defendant showed to the complainant the copy of the will, explained to him the defect, and informed him, that it having only two witnesses would not authorize the defendant to make a title to the purchaser, that the will was inoperative as to the land; that Beall had become the purchaser, but refused to complete the contract unless the complainant would convey the land. The defendant then showed the deed, so prepared, to the complainant, and asked him if he would execute it. That the complainant, being fully acquainted with the nature of the will, voluntarily, and without any hesitation, agreed to convey his title to the property, and

to execute the deed to Beall. That the defendant had also a power of attorney prepared to have the deed properly acknowledged by some person in this State; but the complainant informed the defendant, that he wished to make a visit to his uncle John, who resided near to Shepherd's Town, and Allegany County being on the road, he would, on his way through that county, execute and acknowledge the deed; which was accordingly \* done on the 7th of February, 1791. That the complainant and defendant were 418 in company together for several days after the execution of the deed, and conversed respecting it, and the complainant expressed himself satisfied with its execution. When the defendant saw the complainant several years after, he did not express any dissatisfaction at having conveyed the land to Beall. The defendant denies that he ever told the complainant that the will of Thomas Hamilton was good and valid in law, but on the contrary informed him that it was defective and inoperative to pass land, or give any power or authority to affect the same. He also denies that he ever informed the complainant that he would apply to the Governor and Council, &c. and denies the other allegations stated in the bill, of fraud, deception, &c.

Testimony was taken under commissions, and the cause having been argued and submitted,

HANSON, C. (24th September, 1805,) stated, that whether he shall decide in favor of the complainant, or in favor of the defendants, the case must, to every candid person, appear hard for the loser, and most probably litigation will be continued as far as possible to the great expense, trouble, and anxiety of both parties.

In various cases of doubt or difficulty, or hardship, the Chancellor has thought proper to recommend a compromise and decree by consent, and experience has convinced him that he is right. He considers this case peculiarly proper for a settlement in that way. He has never had before him a case concerning the merits of which he more doubted, and of the event of which, after his decision, doubts might more reasonably be entertained.

Acting on principles which have always governed him, and led by those principles to consult the welfare, as far as his power extends, of every suitor in this Court, whose conduct has not, in his opinion, deserved punishment or reprobation, he proposes an adjustment, such as he believes an intelligent, careful, impartial arbitrator would award. Such as cannot be greatly detrimental to the party, who shall be finally victorious, in case this proposal shall be rejected, but which, in such case, will have been beneficial to the other party.

Let the parties, by writing here filed, consent to a decree to the following purport, viz.

\* 1st. The defendants, heirs of Brooke Beall, shall on or before the 25th day of March next, pay or bring into this 419

Court, to be paid to the complainant, the sum of 800 dollars; and in case that sum shall not be so paid, or brought in, the payment thereof, with interest, may be enforced by execution on the persons or property of the defendants.

2d. The complainant shall execute and acknowledge, according to law, a release to the defendants of all his right, legal or equitable, to the property in question.

3d. Each party shall bear the proper costs.

This recommendation of the Chancellor was not acceded to, and he then passed the following decree:

The defendants having rejected the Chancellor's recommendation, it becomes incumbent on him to determine as a Judge, wholly in favor of them, or of the complainant, according to the best of his judgment, and knowledge of the principles of this Court, and not, as he wishes he were authorized to do, in the spirit of a fair, impartial, intelligent arbitrator.

Under the special circumstances of the case he may not speak so largely as it is customary for him to speak in decrees of importance. But he will say thus far—As he is not satisfied that a fraud was perpetrated, or even if it was, that Beall, the purchaser, was a contriver, or privy to, or partaker of it; as the complainant suffered many years to elapse before he filed his bill; as the property hath since been greatly improved and changed, and hath devolved on several representatives; as the argument from convenience ought always to have influence, he cannot think the complainant entitled to relief.

It is true that some of those reasons would, if standing alone, be entitled to little or no weight, but when united they appear to form a sufficient and firm prop or support for the defendants.

Were indeed the Chancellor fully convinced from the evidence, that, before the complainant executed the deed, there were, between him and Andrew Hamilton, transactions which this Court must consider as constituting a fraud on the part of Andrew, the circumstances herein stated as reasons would not induce the Chancellor to refuse relief. Consider too, the rule respecting the refutation of an answer—examine the answer and evidence in this cause together—

**420** compare the testimony on each side—consider, as \* we must do, when witnesses differ, whose testimony is most probable—consider even if the complainant's witnesses are correct, and their testimony is to prevail against the answer and opposing testimony, how far ignorance should protect a man in this Court. If one party shall tell the other a most improbable story to intimidate—For instance, if A. tells B. a plain common farmer or planter in Virginia, "if you will not execute this deed, the Governor of Maryland, in virtue of a law of his State, will send for and compel you." If the farmer be not half an idiot or a lunatic or in a state of mental imbecility, it must be difficult for even three witnesses against a defend-



ant's answer, to satisfy the mind that A's declaration has induced the farmer to make the conveyance. The testimony of those who swear to Andrew Hamilton's declarations must be unsatisfactory; their memories must be defective; if not, it may be demanded, wherefore did they stand by and permit the falsehood to have its effect?

If ignorance were by this Court protected to that extent, how many fair contracts might be set aside! Ignorance indeed, real or pretended, might in many instances have the advantage of knowledge and wisdom. In the Chancellor's opinion, on a view and comparison of all the proofs, there has not in this case been that *suggestio falsi, aut suppressio veri*, which can authorize him to grant the relief prayed by the grantor in the deed against fair purchasers, who have long been in possession of, and improved the property, before a demand of any kind made of or against them. Decreed, that the bill be dismissed, but as the complainant had probable grounds for instituting the suit, it is dismissed without costs. From this decree the complainant appealed to this Court.

The cause was argued before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, JJ.

Johnson, (Attorney-General,) and Magruder, for the appellant, cited 1 Fonbl. 189; 1 Pow. on Cont. 140, 144; Broderick vs. Broderick, 1 P. Wms. 239; 2 Pow. on Cont. 156; Evans vs. Llewellyn, 2 Bro. Chan. Ca. 150; Brogden vs. Walker's Ex'r, &c. (ante 285; ) 2 Fonbl. 158; Jennings vs. Moore, 2 Vern. 609; Blenkarne vs. Jennings, 1 Bro. Parl. Ca. 244; and Doe vs. Martin, 4 T. R. 66.

\* Martin and Shaafl, for the appellees, cited 1 Fonbl. 115, 189, (note,) 384; and Pasley vs. Freeman, 3 T. R. 51. **421**

Decree affirmed.

# REINICKER vs. SMITH. SMITH vs. REINICKER.

T. F. and B. F. being seized as tenants in common under the Act to Direct Descents, with S. S. of and in (among others,) a lot of ground, contracted separately with G. R. and agreed to convey to him all their interest therein; on the payment to each of them of \$300; and the money being paid, possession of the lot was delivered to G. R. who, after the death of T. and B. F. filed a bill in Chancery against S. S. she being their heir, for a specific performance of the contract. S. S. by her answer, alleged that both T. and B. F. were in habits of intemperance, and were almost constantly in a state of intoxication. That the lot was contracted to be sold by them when in a state of intoxication, or when they were incapable of transacting business, at a price greatly below its value, &c.—Decreed, that S. S. convey to G. R. one undivided third part of the lot of ground; but as to the contract of B. F. on account of the satisfactory

proof or his imbecility, it ought not to be enforced; and that G. R. deliver to, or permit S. S. to take or enjoy two undivided third parts of the lot of ground, without her refunding the consideration paid by him to B. F. (a)

A tenant in common, under the Act to Direct Descents, may dispose of his interest in any particular portion of the estate so held in common.

CROSS-APPEALS from a decree of the Court of Chancery. The complainant, (Reinicker,) filed his bill of complaint against the defendant, (Smith,) stating that Thomas Franklin, being seized of a lot of ground in Baltimore, agreed to sell all his interest therein to the complainant for the consideration of £112 10 0, which agreement was reduced to writing, and is evidenced, by the bond of conveyance exhibited, dated the 20th of March, 1794. That the consideration money has been fully paid. That the bill further stated, that Benjamin Franklin, brother of Thomas, afterwards claiming to be possessed of an interest in the premises, agreed to transfer and convey the same, absolutely, to the complainant, for the consideration of \$300, which agreement was reduced into writing, and is evidenced by the bond of conveyance, exhibited, dated 29th of July, 1794. That the consideration money has been fully paid; and the complainant, ever since the execution of the two bonds of conveyance, has been in the quiet, secure, and unmolested enjoyment of the premises. That Thomas and Benjamin Franklin are both since dead, and that Sarah Smith, the defendant, is seized and possessed of the inheritance and legal estate in the premises, by right of descent, and as heiress at law. That the complainant has frequently applied to her for a deed of conveyance of the premises, which she has refused to execute, and has instituted actions of ejectment for the recovery of the possession of the premises. Prayer for a specific performance of the agreements, and a deed of conveyance of the premises, and for an injunction, &c. The answer of the defendant stated, that her brother, James Franklin, was in his life-time seized and possessed, and died seized and possessed, amongst other real estate, of the lot of ground mentioned in the bill, on the 31st of December, 1793, intestate, leaving a sister, (the defendant,) and two brothers, Thomas and Benjamin, before named, and which two brothers, and the defendant, on the death of James, became, under the Act to Direct \* Descents, entitled equally to all the real

**422** estate of which James died seized, subject to the provisions and regulations mentioned in that Act. That both her said brothers were in the habit of drinking strong liquor to great excess; and from the time of the death of their brother James, being freed from all restraint, and having entirely in their power the means of gratification, and being, it is believed, encouraged in their excesses by persons who wished to obtain advantages over them, they were

(a) See *Brogden vs. Walker*. ante, 285.

almost constantly in a state of intoxication; and that when not actually drunk, they were scarce ever, if ever, free from the effects of the excesses to which they were addicted, and the mental imbecility arising therefrom. That their extreme fondness for strong liquor, and their anxiety to obtain it, also rendered them open to imposition from any person who would furnish them with money by which they could procure their gratification, however exorbitant the terms; and whatever contract they, or either of them, might have entered into for the sale of lands, it is believed, originated either from their being in a state of intoxication at the time, or from the solicitude of acquiring money for their excesses, as they had no occasion to dispose of any of their real estate to supply any necessary want. That both her brothers died within eight months after the death of her brother James, and within eleven days of each other, having fallen victims to their constant intoxication. That Benjamin died on the 10th, and Thomas on the 20th of August, 1794. That the lot of ground mentioned in the bill, is situate in a very valuable and improving part of Baltimore-Town, and contains an acre of ground, and is believed, by the best judges, to be worth upwards of £2,000. That Reinicker pretends to have the bonds of conveyance set forth, but they are not admitted to have been executed by her brothers, or either of them, or that they received the alleged consideration; but if the bonds were executed, she has no doubt but they were executed by her brothers when in a state of intoxication, or when they were incapable of transacting business, and that advantage was also taken of their ignorance of the value of the property; for the money alleged to have been paid for the property is not equal to the sixth part of the value of the lot. She admits that she has refused to convey the lot to Reinicker, because she was and is of opinion, \* that she is not bound in law or equity to convey the same. That she is willing, and has offered to pay to **423** him any sum of money which her brother Thomas hath actually received from him.

Testimony was taken and returned under a commission which issued, and the case was argued before, and submitted to, the Chancellor.

HANSON, C. The complainant applies for the performance of a contract made by a brother of the defendant, who has refused on the ground of the complainant's having taken advantage of a man whom habitual intoxication had rendered unfit to manage his own affairs, and an easy prey to an artful, designing man.

The Chancellor conceives that the privileges of drunkenness are pretty well ascertained, and that they ought not to be extended. Has it ever been settled or understood, that because a man is addicted to strong drink, no contract which he makes shall be binding, unless he, or those who come after him, shall think it eligible to

abide by the bargain ? If this were the case, a drunkard would have advantages far superior to those which are enjoyed by the most prudent, shrewd, sagacious man. For instance, seven years ago he sold land for £5 an acre, which in the opinion of witnesses was at that time worth £7. It is now worth £20. He has not conveyed it. Being sued in Chancery, he says, "it is well known that I was every day drunk, and therefore the contract ought not to stand." The Chancellor, as he has already said, considers the privilege to be well ascertained, and sufficiently extensive. If a man evidently has procured another to be intoxicated, in order that he might obtain an unconscionable bargain of him, and has obtained it, this Court will not, on application, hesitate to vacate the contract. But if a man, accustomed to strong drink, and even to be intoxicated every day, but notwithstanding possessed of reason, and the power of reflection, determines, with all the deliberation he is capable of, to sell his property, offers it repeatedly for sale, at length sells it at the best price he can obtain, to a man, against whom there is not proof of his having taken advantage of the hour of intoxication ; if afterwards he professes himself satisfied with the bargain, and assigns a good reason for it—when the bargain is clear, explicit and certain—when

it \* has been fully executed on the other side—the Chancellor  
**424** cannot think, that under such circumstances this Court ought not to enforce it. He has described the case before him with respect to Thomas Franklin, as appears to him from the proceedings. Deceased, that the defendant, by a good deed, to be acknowledged and recorded according to law, give, &c. to the complainant, and his heirs, one undivided third part of the lot or ground mentioned in the bill, and the bonds from Thomas and Benjamin Franklin, deceased, to the complainant.

As to the contract of Benjamin Franklin, the Chancellor is of opinion, that on account of the satisfactory proof of his imbecility, it ought not to be enforced by this Court ; but that the money to him paid by the complainant ought to be restored. Deceased also, that the defendant pay to the complainant the sum of \$300, which was, it appears, paid by the complainant to Benjamin Franklin, deceased, and that upon her executing and acknowledging the deed hereby directed, and paying to the complainant, or bringing into this Court, to be paid to him, the sum of \$300, the injunction in this cause issued be dissolved ; and that the complainant be enjoined to, and shall deliver to her, or permit her to take or enjoy, two undivided third parts of the lot or ground before mentioned. From this decree both the complainant and defendant appealed to this Court.

The cause was argued before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, JJ. by

*Key* and *T. Buchanan*, for Reinicker ; and by

*Martin* and *Harper*, for Smith, who contended, that the contracts ought not to be decreed to be specifically performed, because of

drunkenness, and the inadequacy of price. To the first, they cited 2 *Pow. on Cont.* 226, 227; *Osmond vs. Fitzroy*, 3 *P. Wms.* 131, (note A); *Cory vs. Cory*, 1 *Ves.* 19; 1 *Fonbl.* 68; 2 *Pow. on Cont.* 78, 153, 158, 221, 224, 225, 227; *Chesterfield vs. Janssen*, 2 *Ves.* 155; *Pope vs. Roots*, 7 *Bro. Parl. Ca.* 184; *Clarkson vs. Hanway*, 2 *P. Wms.* 203; *Cole vs. Gibbons*, 3 *P. Wms.* 293; *Baldwin vs. Rochford*, 1 *Wils.* 229; *Attorney-General vs. Syderfin*, 1 *Vernon*, 224; *Green vs. Wood*, 2 *Vernon*, 632, and *Phillips \* vs. Buck*, 1 *Vernon*, 227. **425**

The counsel for Reinicker cited 2 *Pow. on Cont.* 152 to 159, 144 to 145, 220, 228; 1 *Pow. on Cont.* 30; *Sugden*, 167.

THE COURT affirmed that part of the decree of the Court of Chancery from which Reinicker appealed, with costs. And on the appeal by Mrs. Smith, the Court reversed that part of the decree which decreed that she should pay to Reinicker \$300, without costs in either the Court of Chancery or this Court; and they decreed, that on her executing the deed directed, the injunction should be dissolved, and that Reinicker be enjoined to, and should deliver to her, or permit her to take or enjoy, two undivided third parts of the lot of ground mentioned in the proceedings. *Decree reversed in part.*

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\* BURK vs. THE STATE.

**426**

An indictment containing two counts, one charging felony, and the other a misdemeanor, was held to be good. (a)

After a prisoner has pleaded generally to an indictment, having two counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the other. (b)

When nine jurors are sworn in a criminal case, and the rest of the original panel is exhausted by peremptory challenges, the Court can legally award an order for the summoning only three talesmen, and when eleven are sworn, to summon but one. (c)

As to the manner of awarding a *venire* for summoning talesmen in criminal cases, capital.

As to the joinder of offences in criminal cases, and the joinder of causes of actions in civil cases.

ERROR to Washington County Court. An indictment, containing two counts, one for a rape committed on the body of Catharine Maria Brawner, and the other for an assault, with intent to commit a rape, on the same person, was found in the County Court of Frederick against the plaintiff in error, at February Term, 1809, and removed, on his suggestion and affidavit, by the transmission of a

(a) Approved in *State vs. Sutton*, 4 Gill, 494, *Manly vs. State*, 7 Md. 149; *Wheeler vs. State*, 42 Md. 566; *State vs. McNally*, 55 Md. 563.

(b) Approved in *State vs. Bell*, 27 Md. 677.

(c) See Rev. Code, Art. 62, sec. 16.

transcript of the record to Washington County Court. The nature of the indictment, and facts upon which the questions of law were raised, sufficiently appear in the opinion of the Court below, delivered by

BUCHANAN, Ch. J. This case now stands on a motion in arrest of judgment. The indictment contains two counts—the first charging a rape, and the other an assault with intent to commit a rape.

The prisoner was arraigned upon the whole indictment, and pleaded generally, not guilty. The attorney for the State then elected to proceed against him on the first count in the indictment, and the jury were accordingly sworn, and charged upon the first count alone, and found him guilty of the offence therein alleged, particularly confining their verdict, by the expressions of it, to the first count; on the second count no verdict was given.

Fifteen of the jurors returned were peremptorily challenged by the prisoner when put upon his trial, and nine sworn, which exhausted the original panel. On motion of the attorney for the State, an order to the sheriff to summon three talesmen, was awarded by the Court, two of whom were sworn, and one challenged. An order to summon one talesman was then awarded on the application of the attorney for the State, and the person summoned, sworn, which made up the legal number of twelve sworn on the jury.

There are three questions for the consideration of the Court, growing out of the indictment and proceedings thereon, and the reasons assigned in arrest of judgment.

First.—Whether the indictment, containing two counts, one charging a felony, and the other a misdemeanor, is radically bad?

Secondly.—Whether, after the party had pleaded generally to the indictment, the jury were legally sworn and \* charged upon  
427 one of the counts only to the exclusion of the other. And

Thirdly.—Whether, when nine jurors were sworn, and the rest of the original panel exhausted by peremptory challenges, the Court could legally award an order to the sheriff to summon only three talesmen; and again, when eleven were sworn, to summon but one!

In the examination of these questions, the order in which they are stated will be inverted; and the manner of supplying the jurors by talesmen, be first considered.

It cannot be doubted, that in this State, a *tales de circumstantibus* may be awarded in capital cases; such is the uniform practice, and such are the provisions of the Statute of 35 Henry VIII, ch. 6. But it is contended that as three were wanted in the first instance to supply the deficiency, and, as the prisoner, (having challenged only fifteen,) was entitled to five more peremptory challenges, a less number than eight could not be applied for by the prosecutor, or awarded by the Court. And the same ground is taken against the second order. But this idea is unsupported by authority. Several

authorities have indeed been cited and relied on in aid of the objection made to the number of talesmen awarded, which, when examined, only go to show, that Courts may, if they please, to prevent the delay that might be occasioned by the defendant's challenges, award a greater number than was on the original panel; and this is admitted. But no case has been cited, or authority referred to, which denies the power of Courts to award only so many talesmen, as would with those sworn, make up the number of twelve; or in support of the position, that a less number cannot be awarded than would be sufficient to make up the deficiency, after the defendant has gone through with his challenges; or in other words, that as the number deficient, and the remaining peremptory challenges to which the party was entitled, amounted together to eight, not less than eight could legally have been awarded in the first instance. Nor is the idea strengthened by the reason of the case, for if so many must always be awarded as will leave a sufficient number to supply the deficiency, after the defendant has completed his challenges, it would be impossible to ascertain the number proper to be summoned; for besides peremptory challenges, a prisoner is entitled to challenges for \* cause, without number. And it is not to supply deficiencies occasioned by peremptory 428 challenges only, that talesmen are awarded; but deficiencies, occasioned in criminal trials by any other cause, must be made up by talesmen as in civil cases, in which peremptory challenges are not allowed.

There is no principle laid down more broadly in the books, than that the award of talesmen must be repeated until the legal number of twelve is completed, the subsequent tales being always for a less number than the former; and this precludes the idea that the award must always, in the first instance, be of so many as to leave enough to supply the deficiency, after the party has completed his challenges; for in that case, there could never be a second tales ordered. It is true that in capital cases, Courts may, if they please, award an order to the sheriff to summon more than the precise number necessary to supply the deficiency, though there is no obligation on them to do so; and if, in this case, the prisoner, or his counsel, had requested a greater number to be summoned, he would have been gratified. But an order for three only in the first instance, and one in the second, was prayed by the attorney for the State, and each prayer and order acquiesced in at the time by the counsel for the accused. The second tales was for a less number than the first, and each was for the precise number necessary, with those sworn, to make up the legal number of twelve, and in strictness of law, that is all that is required in such case; and as far as this Court are informed, is in strict conformity with the practice throughout the State.

The second question, "whether, after the prisoner had pleaded generally to the indictment, the jury were legally sworn and charged

on one of the counts only?" is fully resolved in *Young vs. The King*, 3 T. R. 106; in which it is said, "that if an indictment contains several counts for separate offences, the Court may quash it before the party has pleaded, or the jury are charged; but if it should not be discovered until after the defendant has pleaded, or the jury are charged, the Judge may put the prosecutor to elect on which charge he will proceed."

That case goes much further than the present, for in that it is laid down, that not only after the party has pleaded generally to the indictment, but after the jury are sworn upon the whole issue, for they  
**429** are never charged \* before they are sworn, the Court may make the prosecutor elect on which count he will proceed, and in this case though the attorney for the State did not elect to proceed on the first count alone, until after the prisoner had pleaded, yet it was done before the jury were either charged or sworn; and if the position taken in the case referred to is tenable, the proceedings on that part of the case before the Court are correct.

The next and only question remaining to be considered, is, "whether the indictment containing two counts, one charging a felony and the other a misdemeanor, is substantially vicious," as is contended for on the part of the prisoner?

The exception taken to the indictment is attempted to be supported by assimilating the proceedings in criminal trials, to those in civil cases, which is not correct to the extent contended for.

If entire damages be assessed on a declaration containing several counts, any one of which is bad, it is error; but there is no principle better established, than that if a general verdict of guilty to be found on an indictment containing several counts, it is sufficient, if one is good, although all the rest are bad.

It is objected, that a felony and a misdemeanor can no more be charged in the same indictment than assumpsit and tort can be joined in the same declaration. But the reasons given in the books, why certain different causes of action may not be joined in the same declaration are, that the process is different; that they do not admit of the same general plea, and are not followed by the same judgment. And here again the analogy, contended for between the proceedings in criminal and civil cases, does not hold; for it has long been settled, that an indictment may charge several felonies of different grades, and requiring different legal judgments, as offences clergyable, and offences not clergyable, such as murder and manslaughter, burglary and larceny, &c., and that the party may be acquitted of one of the offences charged, and convicted of the other, and receive judgment accordingly; and if so, there is no substantial reason why a rape, and an assault with intent to commit a rape, may not be charged in the same indictment; for, leaving the Act of 1793 out of consideration, the legal judgments required on two such counts are not more dissimilar, than on two counts, one charging burglary



and \* the other larceny, &c. And it is laid down in *Brown vs. Dickson*, 1 T. R. 276, and in *Dickon vs. Clifton*, 2 Wilson, 430 319, and others, that whenever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration.

Now apply that rule to the indictment in this case, and the objection falls; for in this State the legal process on each of the offences charged is the same; they admit of the same general plea, and by the Act of Assembly, 1793, ch. 57, sec. 10, the same judgment may be pronounced.

It has been further urged, that a felony and misdemeanor cannot be laid in the same indictment, because they require different modes of trial; on one charge the party accused having a right of challenge, and on the other not; and also being subject to arraignment on one and not on the other. But neither the arraigning a man on an indictment for a misdemeanor, nor indulging him in a peremptory challenge, is error after verdict.

That objection, therefore, fails in reason, as it relates to the misdemeanor, nor does it appear to have any more weight as it applies to the charge of felony; for the party accused having no right to peremptory challenges on the count for misdemeanor, could not, by the addition of that count, be in any manner prejudiced in his challenges, or otherwise, on the count for felony, before the Act of 1802, ch. 69.

It is true; that in this State, under that Act of Assembly, a party, indicted for a misdemeanor, is entitled to a panel of twenty jurors, four of whom he may strike out; but that affords no stronger argument against the uniting a felony and a misdemeanor in the same indictment, than the right which every one, charged with a capital offence, has to twenty peremptory challenges, does to the joining several capital felonies in the same indictment; and it is a settled principle, that different felonies may be charged in the same indictment, and though they might confound the prisoner in his defence, or prejudice him in his challenges: for he might have reason to object to a juryman's trying him on one of the counts, whom he would wish to be sworn on the others; yet it is no objection to the indictment after verdict. Why then should the addition of a count for a misdemeanor vitiate an indictment charging a felony? But to prevent prejudice to prisoners in their challenges, \* and confusion in their defence, Courts may, and perhaps ought, 431 before the jury are charged, to quash indictments containing separate and distinct felonies, or to make the prosecutor elect on which count he will proceed; so for the same reason, and particularly since the Act of 1802, ch. 69, there would be a propriety in pursuing the same rule in relation to indictments charging a felony and misdemeanor.

If, as it is alleged, no case of an indictment charging a felony and a misdemeanor, is to be found in the books, it affords no argument

against the correctness of such an indictment; the case may never have arisen, or the principle may never have been questioned, and therefore not reported.

And if this is a question of first impression, it must be decided on principles of analogy to other cases; and thus tested, the indictment does not appear to be defective; not on account of the modes of trial in cases of felony and misdemeanor being different, for it is no objection, after verdict, that a traverser on an indictment for a misdemeanor was arraigned, or indulged with a peremptory challenge.

In 2 *East's Crown Law*, 1023 and 1029; 2 *Hawkins' Pleas of the Crown*, 625, and *Kelyng's Reports*, 29, it is laid down as settled law, that if the special circumstances of the case be set forth in an indictment for an offence laid as felony, and the defendant found guilty generally, and afterwards the Court should be of opinion that the fact does not amount to felony, but only to a trespass, judgment may be given as for a trespass only.

In such a case, the party accused would be arraigned, and have his challenge, and yet the offence contained in the indictment only a trespass or misdemeanor, though charged as a felony; and the principles so established, may perhaps be applied with force to the present question in all its parts; for if a misdemeanor may be charged as a felony, and punished as a misdemeanor, why not a felony and a misdemeanor be laid in the same indictment, and the party be acquitted of the felony, and found guilty of the misdemeanor, or *e converso*? Not on account of the party being liable to be prejudiced in his challenges, or the jury perplexed in the application of the testimony; for the same objection might be urged, and with more \* force, to an indictment charging separate and distinct felonies; and yet such indictments are held to be good, and not because the different counts would require different legal judgments; for different felonies may be laid in the same indictment, which are differently punished, and require different legal judgments, such as murder, manslaughter, burglary, and larceny, &c. Moreover, an indictment charging a rape, and an assault with an intent to commit a rape, is less objectionable here than in England; for in this State, under the Act of 1793, ch. 57, s. 10, a conviction of either offence may be followed by the same legal judgment.

In this particular case the two offences charged in the indictment are connected together, and the misdemeanor merged in the felony. No evidence could have been admissible on one count, that was not applicable to the other, which guards it against the objection, that the jury might be confused in the application of testimony of a different nature, and goes to show the compatibility of the two counts; or, if the misdemeanor is to be considered as a separate and distinct offence, committed at a different time, and not a constituent part of the felony charged, it does not alter the case.

The great strictness observed in criminal prosecutions, grows out of the benevolent principle, that every prisoner should have a fair and impartial trial; and this the prisoner in the present case has had.

The attorney for the State, as he had a right to do, abandoned the second count, and elected to proceed on the first, upon which the jury were accordingly sworn and charged. There was no application to quash the indictment, nor any objection made at the trial, to the form of proceeding; but the prisoner chose to take his chance before the jury on the charge of felony, to which the trial was exclusively confined. He was not, nor could he, in any manner have been prejudiced by the addition of the second count, which being abandoned before the jury were sworn, stood as inoperative as if the grand jury had found the indictment a true bill as to the first count, and endorsed *ignoramus* on the second; which they might have done, and the indictment have been good as to the count found a true bill. He had, under this mode of proceeding, every privilege and advantage which he could have if \* the indictment had contained only the count on which he was tried; and now to arrest the **433** judgment would be a perversion of justice.

Upon the whole, in the opinion of the Court, the reasons assigned in arrest of judgment are unsupported.

Judgment was entered on the verdict, sentencing the prisoner to be hung, &c. Sentence of death was pronounced by the Chief Judge; and afterwards the prisoner removed the indictment and proceedings to this Court by a writ of error.

The cause was argued before CHASE, Ch. J. POLK, NICHOLSON, and EARLE, JJ.

*Martin, Taney and Laurence*, for the plaintiff in error, raised the same objections which were urged in the Court below on the motion in arrest of judgment, and contended, that felony and misdemeanor were different offences, and ought not to be found in the same indictment. That under these counts, different modes of trial were required. The prisoner must be arraigned in the first, and not in the other; he must be present at the trial of one, and he need not be at the trial of the other. Judgment might be passed against him on one, when he was not present; but in the other, it could not be done except he was present. In the one he might challenge peremptorily to the number of twenty jurors; but in the other he had no such right. In the last he might strike out four from the panel of jurors, and so might the attorney for the State; but in the former, the attorney for the State could not challenge or strike out from the panel. That the judgments were different; in one, the life of the party might be in jeopardy; in the other, it would not be. That the benefit of clergy might be demanded in the one, and not in

the other. They cited 4 *Blk. Com.* 216, 375; 2 *Hale's P. C.* 173; 2 *Hawk.* 29, ch. 25, s. 59; *Crown C. C.* 111; *Brown vs. Dickson*, 1 *T. R.* 276; *The King vs. Roberts, Carthew*, 226; *Rogers vs. Cook*, *Ibid.*, 235; *Young vs. The King*, 3 *T. R.* 98, per Lord Kenyon on the fourth objection. 1 *Bac. Ab. tit. Actions in General*, (C;) *Dalston vs. Janson*, 1 *Ld. Raym.* 58; *S. C.* 1 *Salk.* 10; *Courtney vs. Collet*, 1 *Ld. Raym.* 272; *Howard vs. Bankes*, 2 *Burr.* 1114; *Gilb. Hist. C. P.* 6; *The King vs. Higgins*, \* 1 *Ventris*, 366; *Mast vs. Goodson*, 3 **434** *Wils.* 354; *Dickon vs. Clifton*, 2 *Wils.* 319; *Swithin vs. Vincent*, *Ibid.*, 227; *Bage vs. Bromwell*, 3 *Lev.* 98; 2 *Hawk.* ch. 25, s. 46, 97; *Rex vs. Wilkes*, 4 *Burr.* 2527; *Rex vs. Pewtress*, 2 *Stra.* 1026; *Hardic.* 203; *The King vs. Stratton*, *Dougl.* 240, 241; *Rex vs. Fieldhouse*, *Coep.* 325; *The King vs. Wheatley*, 1 *W. Blk. Rep.* 275; *The King vs. Clendon*, 2 *Ld. Raym.* 1572; *S. C.* 2 *Stra.* 870; *Rex vs. Benfield*, 2 *Burr.* 980, 984; *The King vs. Sidley*, 1 *Siderf.* 168, 2 *Hawk.* ch. 25, s. 62; *The State vs. Ringgold*, (in the General Court, April Term, 1792;) *Rex vs. Cross*, 1 *Ld. Raym.* 711; 2 *Hale*, 172; *Rex vs. Westbeer*, 2 *Stra.* 1133; *Leaco C. L.* 15; 2 *East's C. L.* 1023, 1028, 1031; 4 *Blk. Com.* 221; *Martin Page's Case*, *Cro. Car.* 332. As to the right and nature of the benefit of clergy, they cited, 2 *Hawk.* ch. 33, s. 20, 23, 25, 112, 114, 115, 121, 128, 129, 132; *Stat.* 1 *Edw. VI*, ch. 14, s. 5; *Stat.* 5 *Ann.* ch. 6; 4 *Hen. VII*, ch. 13; 2 *Harr. Ent.* 52; *Cuddington vs. Wilkins*, *Hob.* 67, 81; *Searle vs. Williams*, *Ibid.*, 294; 5 *State Trials*, 160; *Leach C. L.* 360; 2 *Hawk.* ch. 36, s. 1, 10, 14; *Hale*, 220, 251; and 2 *Hawk.* ch. 47, s. 6.

On the second objection they contended, that the counsel for the State could not elect on what count he would prosecute; but he must prosecute on the case before the Court. They cited 4 *Blk. Com.* 339, 375; 2 *Hawk.* 25, ch. 25, s. 97; *Roche vs. Stedle*, *Hardres' Rep.* 166; 1 *Blk. Com.* 142; *Rosse's Case*, 3 *Leon.* 83; 2 *Roll. Ab.* 722, pl. 19; *Graves vs. Morleg*, 3 *Lev.* 55; 1 *Inst.* 227; *Hooper vs. Shepherd*, 2 *Stra.* 1089; *Rex vs. Pewtress*, *Ibid.*, 1026; *Gildart vs. Rogers*, (in the General Court, October Term, 1786); *Young vs. The King*, 3 *T. R.* 106, per *Buller, J.*; 2 *Hawk.* ch. 27, s. 92; *Fitz. Ab. tit. Discontinuance*, 14, 35; *Bro. Ab. tit. Discontinuance of Process*, 62, pl. 55; *Clerke vs. Clerke*, *Cro. Eliz.* 622; *Sampson vs. Tothil et al.* 1 *Siderf.* 325; 2 *Hawk.* ch. 38, s. 3; *Coke's Ent.* 57, 372, 379, 381, 385, 387, 390; *Rast.* 43, 412; *Rex vs. Boyce*, 4 *Burr.* 2084, 2085; *Tremaine*, 287; *The King vs. Dowlin*, 5 *T. R.* 311; *Foster's Case*, 9 *Coke*, 63; 2 *Hawk.* ch. 47, s. 5, 6, 8, 9, 11, 14; and *Fulmerston vs. Steward*, *Floic.* 109.

On the third objection, as to the tales, they cited *Verni, qui tam vs.* —, 1 *Lev.* 223; *The Queen vs. Banks*, 6 *Mod.* 246; *Gree vs. Sharp*, *Ibid.*, 265; 2 *Hawk.* ch. 41, \* s. 12; *Denbaud's Case*, 10 *Coke*, **435** 105; *Bro. Ab. tit. Octo Tales*, 6, 7, 8, 11, 15, 16, 19; *Vin. Ab. tit. Trial*, 321; 2 *Hawk.* ch. 41, s. 12, 13; 2 *Hale*, 266; *United States vs. Burr*, 1 *Burr's Trial*, 420; *God.* 204; *The State vs. Orndorff*, (in the General Court, October Term, 1783;) *Hurlton vs. Hun*, *Cro. Eliz.* 849,

850; *The Queen vs. The Inhabitants of Stretford*, 2 *Ld. Raym.* 1170; *The King vs. Wheatley*, 1 *W. Blk. Rep.* 275; 2 *Hawk. ch.* 27, s. 105; *Ibid.*, ch. 25, s. 97; and *Rex vs. Wilkes*, 4 *Burr.* 2527.

*Johnson*, (Attorney-General,) *contra*, on the first objection, cited *Young vs. The King*, 3 *T. R.* 98; *Holmes' Case*, *Cro. Car.* 376; *S. C. Sir Wm. Jones*, 321; *The King vs. Joiner*, *Kelyng's Rep.* 29; The Act of 1793, ch. 57, s. 10; *Brown vs. Dickson*, 1 *T. R.* 266; *Dickon vs. Clifton*, 2 *Wils.* 319; 2 *East's C. L.* 1023, 1029; and 2 *Hawk.* 525. On the second objection—*Rex vs. Benfield*, 2 *Burr.* 980; and *Young vs. The King*, 3 *T. R.* 106. On the third objection—The Stat. 35 Hen. VIII, ch. 8; *Denbawd's Case*, 10 *Coke* 103; The Act of 1798, ch. 94; and 4 *Blk. Com.* 354.

*Judgment affirmed.*

#### NORFOLK'S Ex'r *de son tort* vs. GANTT.

On the death of a defendant in an action of debt, &c. a summons may issue to an executor *de son tort*, (there being no legal executor or administrator of the deceased,) to appear to and defend the action.

Where an executor *de son tort*, being summoned, appeared to an action of debt brought against the deceased, and confessed the action, and admitted the debt was due to the plaintiff; an auditor was then appointed to ascertain the sum for which judgment should be rendered, regard being had to the assets, &c. according to the Act of 1798, ch. 101, sub-ch. 8, s. 9. This appointment of auditor was afterwards stricken out by the County Court, and a judgment was rendered on the confession above mentioned, for the debt and costs *de bonis testatoris, si non de bonis propriis* as to costs. Error being brought, the judgment was reversed by the Court of Appeals.

**ERROR** to Calvert County Court. An action of debt was brought on a single bill, by the defendant in error, against James Norfolk in his life-time, to which he appeared and pleaded payment. His death was afterwards suggested, and a summons issued for the plaintiff in error, as executor *de son tort*, to appear and defend the action, who being summoned, appeared and afterwards confessed the action, and that the debt demanded was due to the defendant in error, together with a sum as damages and costs. Upon which an auditor was appointed to ascertain the sum for which judgment should be rendered, according to the Act of 1798, ch. 101, sub-ch. 8, s. 9. The auditor reported, that it did not appear by the records of the Orphans' Court of the county that any administration had been granted on the estate of the deceased, so that he \* could not say what assets, if any, were in the hands of the plaintiff in error. The record states, that the auditor, who had been appointed, on refusing to act, was ordered to be struck out, and another person was appointed in his place. After which, on motion of the defendant in error, it was ordered by the Court, that the appointment of

auditors so made be struck out, and on his prayer that the Court would "enter judgment on the confession" of the plaintiff in error, "so as aforesaid made in the plea aforesaid," the Court entered judgment against the plaintiff in error, for the debt and damages and costs, *de bonis testatoris, si non de bonis propriis* as to the costs. To reverse which judgment the present writ of error was brought.

The cause was argued at June Term, 1808, before TILGHMAN, POLK, and BUCHANAN, JJ. and was re-argued at the present term before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, JJ.

*Key*, and *Johnson* (Attorney-General,) for the plaintiff in error, *Magruder*, for the defendant in error.

THE COURT considered that the summons for the executor *de son tort* to appear and defend the action, issued regularly, and that the executor *de son tort* could be made a party to the action; but that the entry of the judgment was erroneous. *Judgment reversed.*

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BEARD vs. HEIDE.

In executing a commission to take testimony, it is not necessary that the commissioners should appoint a clerk.

APPEAL from Baltimore County Court. Action on the case against a common carrier for negligence, &c. The general issue pleaded. A commission by consent issued to London, for the purpose of obtaining testimony, and was returned, with the testimony taken under it. At the trial in the County Court, the plaintiff, (now appellee,) offered in evidence the commission and the testimony, to which evidence the defendant, (now appellant,) objected, on the ground that it did not appear that the commissioners, named in the commission, appointed a clerk. But the County \* Court, [H. 443 RIDGELY, Ch. J.] overruled the objection. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this Court.

The cause was argued before CHASE, Ch. J. POLK, BUCHANAN NICHOLSON, and EARLE, JJ. by

*W. Dorsey*, for the appellant; and *Brice* for the appellee.

*Judgment affirmed.*

## HAMMOND vs. HIGGINS et ux.

In an action of dower a judgment was confessed for the demandant's dower claimed in the lands. A writ of *habere facias seisinam* issued, and the demandant's dower laid off. On the return of the writ, the County Court entered judgment for nominal damages, and costs. On appeal, the judgment for the damages and costs was reversed.

APPEAL from Frederick County Court. This was an action of dower, to which the defendant, (now appellant,) appeared, and confessed judgment, which was entered in favor of the demandants, (now appellees,) for the dower of the wife, of the third part of two tracts of land called, &c. to hold to them in severalty by metes and bounds; and on the prayer of the demandants, a writ of *habere facias seisinam* was awarded and issued, to cause them to have full seizin of the third part of the lands, &c. which writ accordingly issued, and the dower in the lands were laid off and assigned by a jury, and delivered by the sheriff to the demandants, and on return thereof being made to the County Court, the demandants prayed judgment, "as well for their damages sustained by occasion of the detention of the dower of the said S. in the lands aforesaid, as also for their costs and charges by them laid out and expended," &c. The County Court entered judgment in favor of the demandants against the defendant, for "one penny current money, for their damages sustained by occasion of the detention of the dower aforesaid, as also ninety-five pounds and one penny current money, adjudged by the Court to the demandants for their costs and charges by them laid out and expended," &c. From which judgment the defendant appealed to this Court.

The cause was argued before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, JJ.

Martin, for the appellant, contended that the whole of the proceedings, after the judgment for dower and the \* awarding the writ of *habere facias seisinam* was erroneous. No judgment 444 for damages and costs could be entered after the term at which the judgment for dower was rendered. The form of the writ of seizin was erroneous. It should go the sheriff only, and he is to be aided by no person unless it is necessary to lay out the land, when he can call on the surveyor of the county to run it out. Precedents of writs of *habere facias seisinam* may be found in *Clift's Ent.* 298; *Rast. Ent.* 235; 1 *Rich. C. P.* 296; and 2 *Harr. Ent.* 697. The proper return by the sheriff should be, "I have delivered seizin by metes and bounds," &c. *Rast. Ent.* 335. The form of the writ used in the case before the Court, is that of a writ of partition, and not of *habere facias seisinam*.

The judgment in partition is interlocutory, but in dower it is final. Here the judgment being by confession, there could be no damages and costs, even if the application had been made therefor at the proper term.

*Shaaff and Taney*, for the appellees.

THE COURT considered that the judgment of the County Court, as to the damages and costs recovered, was erroneous.

*Judgment reversed.*

### TOMLINSON vs. RIZER.

In trespass *q. c. f.* the defendant took defence for, and located on the plots, a tract of land called G. C. which included the tract called T. N. on which the trespass was alleged to have been committed, and which last tract the plaintiff located on the plots; and he also located lot No. 3,351; but he did not counter-locate the location made by the defendant. The defendant read in evidence the grant of G. C. which called to begin at the end of the second line of lot No. 3,351.—*Held*, that it was not necessary for him to produce the grant of lot No. 3,351, to prove the location of that lot, and the beginning of G. C.

The Court refused to direct the jury in an action of trespass, that it was incumbent on the plaintiff, in order to support his action, to prove a title to the land, on which the trespass was alleged to be committed, or to prove an actual possession by enclosures, located on the plots.

ERROR to Allegany County Court. An action of trespass *quare clausum fregit*, was brought by the defendant in error, against the plaintiff in error, for breaking and entering the close of the defendant in error, called Trouble for Nothing, lying in Allegany County. The defendant in the Court below pleaded, 1. Not guilty, and 2. Justification that *locus in quo* was a close of land called Grate's Sugar Camp, and the freehold of John Hains, and that the defendant, as his servant, and by his license, entered, &c. general replication, and issues were joined. There were other replications to the last plea, which were demurred to, but as they were not noticed by the Court, they are \* omitted. A warrant of resurvey issued, **445** and the lands called Trouble for Nothing and Grate's Sugar Camp, and the place where the trespass was alleged to have been committed, as also lots No. 3,350 and No. 3,351, were located on the plots returned. The defendant took defence for Grate's Sugar Camp, as including Trouble for Nothing, to which there was no counter-location made on the plots.

1. At the trial the defendant read in evidence a grant of the land called Grate's Sugar Camp, to John Hains, on the 1st of March, 1802, "beginning at the end of the second line of lot No. 3,351, and running thence N. 27 E. 46 perches, S. 26 W. 90 perches, S. 62 W.



50 perches, thence by a straight line to the beginning," &c. The plaintiff then prayed the opinion of the Court, and their direction to the jury, that it is incumbent upon the defendant to produce patents of lots No. 3,350 and 3,351, to prove the beginning and location of Grate's Sugar Camp to be correct; to which direction and opinion being given, the defendant objected, and prayed the Court to direct the jury, that as the plaintiff has located the lots No. 3,350 and 3,351, and Grate's Sugar Camp, upon the plots, including the place where the trespass is located as committed, it is not necessary for the defendant to produce patents for lots No. 3,350 and 3,351, to prove the location of those lots, and the beginning of Grate's Sugar Camp. But the County Court, [CLAGETT, Ch. J.] refused to give the direction prayed by the defendant; and gave the direction prayed by the plaintiff. The defendant excepted.

2. The defendant then prayed the opinion of the Court, and their direction to the jury, that it is incumbent on the plaintiff, in order to support his action, to prove a title to Trouble for Nothing, or to prove an actual possession by inclosures located upon the plots. Which opinion and direction the Court refused to give. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant brought a writ of error to this Court.

The cause was argued at the last June Term before POLK, BUCHANAN, NICHOLSON, and GANTT, JJ.

*Johnson*, (Attorney-General,) and *Perry*, for the plaintiff in error, cited *Dockery vs. Maynard*, 1 H. & McH. 209; *Jarrett vs. West*, 1 H. & J. 501.

*T. Buchanan*, for the defendant in error.

*Curia adv. vult.*

\* THE COURT, at this term, disagreed with the Court below in the opinion expressed in the first bill of exceptions, but 446 concurred with them in that expressed in the second bill of exceptions.

*Judgment reversed, and procedendo awarded.*

#### HAMMOND vs. SAPPINGTON.

N. H. for a valuable consideration, contracted with, and conveyed to J. S. by metes and bounds, 800 acres, part of a tract of land, "situate, lying and being, in the State of Kentucky, in the County of Bourbon, and on the main branch of Licking." A grant of the land described it as "lying and being in the County of Bourbon, on the main branch of Licking, in the State of Virginia." After the grant of the land, a new State, by the name of Kentucky, was formed from Virginia, and the County of Bourbon, became a part of Kentucky. which county was afterwards divided, and two new counties erected, called Clarke and Mason Counties, and the land now lies in those two counties. J. S. filed

his bill in Chancery to have the contract vacated, and the consideration money repaid to him, &c. Decreed, that his bill be dismissed.

APPEAL from the Court of Chancery. The bill of the complainant, (now appellee,) filed on the 3d of September, 1802, stated, that in the year 1796 he purchased of the defendant, now appellant,) a mill-seat, in Anne Arundel County, at and for £160 money paid down at the time, and obtained possession; and not doubting but that a clear title could be given to him by the defendant, he improved the property, and expended in improvements £120. That finding afterwards that the defendant had no right to the land, he applied to him to repay the money expended and to refund that which he had received; which the defendant refused to do; but again practising another deception and imposition, he agreed to sell and convey to the complainant, in consideration of the premises, and the money paid and expended for and on the mill-seat, 800 acres of land situate in Bourbon County, in the State of Kentucky, and accordingly executed a deed therefor, dated the 10th of February, 1796, in which the land is described "as all that part of a tract or parcel of land, contained within the metes and bounds of a tract of land, containing in the whole 6,134 acres, beginning for the said part at the beginning trees of the whole tract, and running" &c. describing the part by metes and bounds, "situate, lying and being, in the State of Kentucky, in the County of Bourbon, and on the main branch of Licking, containing 800 acres," &c. That the complainant made preparation, and did remove to the State of Kentucky, and went in search of the land in Bourbon County, and according to the description contained in the deed, but to his great surprise no such land was there to be found, to which the complainant had any kind of claim or title; that he caused the records to be examined, and the result was, that the complainant owned no land in that

**447** \* county. That he called on the defendant, and informed him of the premises, and requested him to refund the sum of £280, the consideration of the purchase of the land, and to make him compensation for the loss of time, &c. but the defendant refused to do either. Prayer, that the money be decreed to be repaid, and for further relief, &c. The answer of the defendant denied that he had no title to the mill-seat. That at the instance and request of the complainant, he consented to give him his right in 800 acres of land in Kentucky, for the mill-seat and improvements, the complainant alleging that the lands the defendant was to give him his right in, were good in quality, and that J. D. his brother-in-law then in Kentucky knew the lands, and had informed him of their quality. The defendant showed his title in the lands to the complainant, being patented to Richard Ridgely, Esquire, on the 23d of November, 1790, and conveyed to the defendant by deed dated the 2d of November, 1793, and duly recorded, &c. That the patent for the land was granted

before the adoption of Kentucky, as a State of the Union; and when the warrants were granted for the land, for which the patent issued, the land lay in Virginia, and in Bourbon County. That since that time Kentucky has become a State, and the County of Bourbon has been divided, and two new counties have been erected, called Clarke and Mason Counties, and that the land lays in those counties. He denies all fraud, &c. The grant for the land, as exhibited, is dated the 3d of November, 1790, and was issued by the Governor of the State of Virginia to Richard Ridgely, and the land is therein described to be a tract or parcel of land containing 6,134 acres, lying and being in the County of Bourbon, on the main branch of Licking, &c. Commissions issued and testimony was taken thereunder.

HANSON, C. (June Term, 1805.) It is evident that the defendant was satisfied the first contract made with the complainant ought by him, as an honest man, to be rescinded; and that the complainant had sustained a grievous disappointment. This is an important consideration in the cause. Well then, to do justice to the complainant, it was incumbent on the defendant to refund the purchase money, and price of the improvements, with interest. But instead of doing this, he purposes to convey a \* large tract of land in Bourbon County, in Kentucky. The complainant accepts the 448 offer, but is again disappointed. It is clear that the defendant's land, if any he has at the place or near the place, &c. does not agree with the description. It is not in Bourbon County. Says the counsel there are two descriptions, and if one is answered, it is sufficient. This is indeed the rule in some cases. It is a rule in favor of grantees. But in a case like the present, that is to say, with respect to bargainees, the rule is reversed. What! If a man agrees to procure me a horse 17 hands high, and of a bright bay color, will it be sufficient for him to bring me a horse of a bright bay color only 15 hands high! It is at my option whether I will take the horse or not.

The contract appears to be for 800 acres of land in Bourbon County, on the main branch of Licking. Suppose then the defendant to have land on Licking but not in Bourbon County, is it conceivable that he complies with his contract by conveying this land? Ah! but Bourbon County once contained that land, but on a division of the county, the land constitutes part of Mason County. It is in vain to argue this way. Is it necessary to mention the first rules of equity with respect to contracts forbidding all tricks, finesse or deception, or even misunderstanding? In short, it appears to the Chancellor, that the complainant was in a manner, or might well suppose himself to be, under the necessity of making a contract for land, which, independently of the contract for the mill-seat, he would neither have offered to purchase, nor have purchased, if offered; that neither of the parties were acquainted with the thing contracted for, and

that the complainant has twice been deceived. In saying this the Chancellor means no imputation on the defendant, who certainly acted honorably with respect to the first contract, and who probably has withstood the claim of the complainant, because he has himself been disappointed, &c. To sustain the fair character he has enjoyed during a long life, he can do no better than perform the following decree, without delay—Decreed, that the contract between the complainant and defendant for the sale and purchase of 800 acres of land in the State of Kentucky, as stated in the bill and answer, be vacated and annulled, and that the deed to the complainant from the defendant, executed in consequence thereof, \* dated the 10th of February, 1796, and filed in this cause, be vacated and annulled, so far as the power of this Court extends, and that the complainant, on the defendant's demand, shall reconvey the said land to the defendant, in the same manner as the defendant conveyed to him. But this may not be done until the defendant shall bring in or pay the money as hereinafter directed. That the defendant bring into this Court, to be paid, or that he pay, to the complainant, the sum of £280, with interest from the 10th of February, 1796; or that on the 10th of February next, he bring into this Court to be paid, or that he pay, to the complainant, the sum of £438 8 6, that being the amount of the money paid by the complainant to the defendant, and of the improvements by him made on the mill-seat, &c. with interest, &c. That the sum last mentioned, if not paid on the last mentioned day, or if the principal and interest be not before discharged, shall carry interest from the last mentioned day. But costs are not to be allowed the complainant. From which decree the defendant appealed to this Court.

The cause was argued before POLK, BUCHANAN, NICHOLSON, and EARLE, JJ.

**453** \* *Shaaff* and *Ridgely*, for the appellant. The decree of the Chancellor is erroneous on two grounds—1. The Court of Chancery had not jurisdiction, and the decree cannot be enforced. 2. If the Court of Chancery had jurisdiction for compelling a specific performance of the contract, yet there is no proof in the case that there was fraud, mistake, &c. upon which to give relief. First position.—A subsequent division of the State, and forming a new one, and the laying off new counties, did not alter the contract, as the land could not be affected by any such proceeding. The decree cannot be enforced in this Court. The remedy is to be against the person, and not against the thing. Suppose the appellant complies with the decree, by paying the money, what process can he have to compel the appellee to comply? Suppose the appellee had paid the appellant the money, and the latter had refused to convey to land, could the Court of Chancery compel a specific performance of the contract?

The Court had no power to compel a deed. It might decree the money to be refunded. If the Chancellor had decreed a deed, could the decree operate in Kentucky? It certainly could not.

\* Second position.—Admitting the Court had competent jurisdiction to give the relief prayed, yet there is not sufficient evidence upon which the relief could be grounded. The answer denies the material facts relied on by the bill. The reason for rescinding the first contract was not for the cause stated by the Chancellor. It was fully proved, that no dam could be made so as to prevent the water from overflowing on the neighboring lands. The first contract was fair and honest; and the rescinding it was perfectly agreeable to both parties, and was done at the instance of the appellee, who instead of wishing the money to be refunded, was desirous to take Kentucky land. There is no proof that the appellee, when he went to Kentucky, made the necessary inquiry as to where the land lay. If the land lay in this State, it was not such a contract as ought to be annulled upon the mere ground of its not lying in the county, if it conformed to the other descriptions. It is sufficient that the land was once in Bourbon County. *Dorsey vs. Hammond*, 1 H. & J. 193.

*Johnson*, (Attorney-General,) for the appellee.

*Decree reversed.*

#### NEGRO GEORGE vs. DENNIS.

On the death of S. E. a resident of this State, a slave belonging to his estate, was, by a bill of sale executed by his administrator in 1792, sold to G. D. also a resident of this State, but who immediately afterwards removed to Virginia, and took the slave with him. On a petition filed by the slave against G. D. for his freedom—*Held*, that he was not entitled to freedom.

APPEAL from Somerset County Court. This was a petition for freedom. The facts of the case, as admitted at the trial, were these—The petitioner, (the appellant,) was the property of Samuel Engersole, who resided in Somerset County, and on his death, came to the possession of Richard Engersole his administrator, who resided in the same county. R. Engersole, the administrator, by bill of sale dated the 16th of October, 1792, sold the petitioner to the defendant, then a resident also of the said county, and who immediately afterwards removed to the State of Virginia, and took the petitioner with him. The Court, (POLK, Ch. J. and DONE, A. J.) were of opinion, and so instructed the jury, that these facts were not sufficient to entitle the petitioner to his freedom. The petitioner excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, NICHOLSON, GANTT, and EARLE, JJ. by

W. B. Martin, for the appellant; and by

J. Bayly, for the appellee.

*Judgment affirmed.*

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### \* BOREING'S Lessee *vs.* SINGERY.

A surveyor's original book of surveys, and his parol testimony, admitted by the General Court, in an action of ejectment, as competent evidence to prove that a certificate of survey returned to the land office, was forged. (a)

The General Court refused to direct the jury, that it is not competent in a Court of law to give evidence to the jury, or to go into any parol examination of the surveyor, or his books, to vacate a grant, or to prove that the certificate of survey returned to the land office as a foundation for the grant, was forged or fraudulent, and not made out by him or his authority. (b)

The Proprietary instructions, requiring a survey to be made of reserved lands, &c. read in evidence.

Depositions returned under a commission issued to Pennsylvania, to take testimony in the cause, were not permitted by the General Court to be read in evidence, it not appearing, by the return of the commissioners, that they had given any notice, or that proper notice had been given. (c)

Depositions similarly taken were not permitted to be read in evidence, although offered in evidence by the opposite party.

ERROR to the General Court. In this case there was a writ of *procedendo* from the late Court of Appeals, directing a new trial of an action of ejectment, (which had been tried in the General Court at October Term, 1799,) for a tract of land called Boreing's Habitation Rock, lying in Baltimore County, containing 300 acres of land. [See 4 H. & McH. 398.] The defendant took defence on warrant for all that part of Boreing's Habitation Rock, which is included in Singery's Troutng Streams, according to his locations thereof on the plots returned in the cause.

1. The plaintiff, at the new trial at October Term, 1805, read in evidence the patent of Boreing's Habitation Rock, granted to Ezekiel Boreing, the lessor of the plaintiff, on the 24th of April, 1795, for 300 acres of land more or less. The defendant produced a grant issued to him the 20th of April, 1775, for the tract called Singery's Troutng Streams, for which he took defence. The plaintiff then

(a) See *Boreing vs. Singery*, 4 H. & McH. 248; *Singery vs. Attorney-General*, *post*, m. p. 487.

(b) Fraud in the obtention of a patent can be inquired into only by a Court of equity, or by the tribunal that issued the patent. *Cook vs. Carroll*, 6 Md. 104.

(c) Cited by DORSEY, J. in *Calvert vs. Cox*, 1 Gill, 120. See *Owings vs. Norwood*, *ante*, m. p. 99. *note*; *Evans' Prac.* 331, 332.

produced the original certificate out of the land office for the land called Singery's Troutng Streams, dated the 30th of September, 1770; and gave evidence by James Calder, that he was surveyor of Baltimore County when the original certificate was returned to the land office, upon which the patent for Singery's Troutng Streams was granted and that the certificate, on which the patent issued, was not made out or signed by him, or by his authority; that the original certificate, as entered upon his book of surveys, contained no call to the beginning trees of the tract of land called Petticoat's Loose, nor was there any such call in the certificate as made out by him, or under his authority. That the certificate as made out by him to be returned to the land office, described the land called Singery's Troutng Streams as "beginning at two bounded white oaks standing between two barren hills at the end of the last line of a tract of land called Merryman's Mountain, (included,) and about west nine perches from George's Run, and running thence," &c. (nineteen courses without any calls,) and then with a straight line to the beginning, containing 178 acres," &c. as taken from his original book of surveys. The plaintiff produced this book in Court, and offered to read it to the jury. He further offered to prove by Calder, that he had examined the \* original certificate of Singery's Troutng Streams, with the entry on his books, before **456** he delivered and signed the original certificate for the land office. By which evidence the plaintiff offered to prove to the jury, that the certificate of Singery's Troutng Streams, returned to the land office, and on which the patent issued, was a forgery, and could not operate to pass more land than was contained in the certificate signed by Calder. The defendant then offered evidence, that no other certificate of Singery's Troutng Streams, except the one on which the patent issued to the defendant, was ever returned to the land office, He also offered in evidence, the certificate returned to the land office, with the endorsements thereon, and the aforesaid patent. [See them set out in 4 H. & McH. 398.] He also offered evidence, that Calder never did make out a certificate for Singery's Troutng Streams from the entry made in his book; and to prove that a certificate for Singery's Troutng Streams never was examined with the said entry, he offered in evidence, by Calder, that he did not begin to survey lands in the reserves of Baltimore County before the 24th of November, 1770, and that he would not have inserted a certificate in his book of an elder date than the 24th of November, 1770, if he had taken notice of such a date. He also offered to prove, that there are certificates of surveys, contained in the said book, bearing date since the 4th of July, 1776. He also offered in evidence the Proprietary instructions to Robert Eden, Daniel Dulany, and John Morton Jordan, dated the 30th of June, 1769, (a) requiring that they should

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(a) Entered in the Council records, J. R. folio 241, &c.

forthwith, if necessary, cause an exact survey and return to be made of the Lord Proprietary's reserved lands and manors, &c. He also offered evidence, that Calder was appointed to survey the lands in the instructions mentioned; and to prove that Calder's authority ceased before the 4th of July, 1776, offered in evidence the Declaration of Independence. He also offered in evidence, that the following part of the entry in the said book, and no more, is in the hand-writing of Calder, to wit: "Amended for Christian Singery, a tract beginning at two bounded white oaks, standing between two barren hills at the end of the last line of a tract called Merryman's Mountain, (included,) and about west nine perches from George's \* Run, **457** and running then N. 87 W. 22 ps. S. 47 ps. W. 69 ps." He also offered in evidence, by Calder, that the latter part of the said entry is not in his hand-writing and that he did not know in whose hand-writing it was, but supposed it to be in the hand-writing of a man named Norris, one of his deputies. That the land included in the courses taken from the said entry, is in the reserves of Baltimore County; and that the entry made in his book, was made after the 4th of April, 1775, but on what day he knew not. The plaintiff further offered evidence, by Calder, that the reason he recorded a certificate in his book, bearing date the 30th of September, 1770, was from an oversight in his not particularly attending to the date of the certificate, and that he would have corrected the erroneous date had it particularly occurred to him. That he had a number of deputies, who were authorized by him to record certificates in his book, after they had been examined and signed by him. The defendant objected to the plaintiff giving any of the evidence offered by him, for the purpose for which it was offered.

*Shaaff*, for the defendant, stated two objections to this testimony—  
 1. Because the book was made without authority, and the entry was not made by Calder himself, nor examined by him, and from his own proof was not made until after the patent issued to the defendant.  
 2. Because it is contrary to the grant, and the grant cannot be held void in this Court. He cited *Troyne's Case*, 3 *Coke*, 80; 13 *Win. Ab.* 519, 527; 2 *Com. Dig.* 575; 2 *Bac. Ab.* 602; *Lane*, 105, (*argt.*); *Upton vs. Basset*, *Cro. Eliz.* 445; *Bull. N. P.* 260; *Stat. 27 Eliz. ch. 4*; *Carvill vs. Griffith*, 1 *H. & McH.* 297; *Marcell vs. Lloyd*, 1 *H. & McH.* 212; *Spaulding vs. Reeder*, 1 *H. & McH.* 187; *Hammond vs. Sheredine*, 4 *H. & McH.* 420; and *Webb vs. Beard*, 1 *H. & J.* 349.

*Martin*, (Attorney-General,) and *T. Buchanan*, for the plaintiff, were stopped by the Court.

CHASE, Ch. J. (sitting alone.) This question, he said, had already been decided in this case at a former trial at October Term, 1799, when there was a fuller Court. He considered himself bound by



that decision, even if he \* thought differently now. He therefore permitted the evidence to be read to the jury, being of opinion that the fact, whether the certificate was forged or not, was a material fact in this cause, and that the evidence offered by the plaintiff was competent and admissible evidence to prove that fact; and that the credit of the witness, and of the surveyor's book referred to, were subjects within the province of the jury, and proper for their consideration upon the whole of the case. The defendant excepted. 458

2. The defendant then, in addition to the facts before stated, gave in evidence, that the locations on the plots made on the part of the defendant are true, as by him located, and contained truly the land granted to him in 1775. And offered evidence to prove, that the land included in the grant comprehends the land granted to the lessor of the plaintiff, called Boreing's Habitation Rock, for which this suit is brought. He also read in evidence an office copy of the record and proceedings then depending in the Court of Chancery, between the lessor of the present plaintiff and the defendant, on a bill exhibited expressly to vacate the defendant's grant. And read in evidence the records and proceedings in the Council Chamber, by which a commission was created for the purpose of selling certain lands of the then Lord Proprietary of Maryland, which is herein before referred to, dated the 30th of June, 1769; and proved, that the land claimed by him in virtue of his patent, were claimed by him under a purchase from the persons acting under that commission, and were part of the private estate of the Proprietary, and not liable to be affected by the ordinary proceedings and usual practice of the land office. He also proved that John Clapham, whose name was to the receipt of the consideration money endorsed on the certificate of the land called Singery's Troutng Streams, stating that he had, on the 19th of April, 1775, received of the defendant the sum of £71 4 0 sterling for the purchase money of that land, was then acting as clerk to the said commission. The defendant then prayed the opinion and direction of the Court to the jury, that it is not competent in a Court of law for the plaintiff, under the circumstances of this case, to give any evidence, or go into any parol examination of the surveyor, or his books, to vacate the defendant's grant, or to prove that the \* certificate returned to the land office, as a foundation for that grant, was forged or fraudulent, and not made out by him or his authority. 459

CHASE, Ch. J. refused to give the direction prayed. The defendant excepted.

3. The defendant then offered in evidence the commission which issued at his instance out of this Court, on the 13th of September, 1799, to Huntingdon County, in the State of Pennsylvania, to take the testimony of witnesses in this cause, with the depositions taken under it. The return to this commission, after setting forth the

meeting of the commissioners, and their having taken the deposition of a witness in answer to certain interrogatories, concludes by the the commissioners certifying, that "the foregoing interrogatories were taken at the instance of Joshua Stevenson, on his asserting that the plaintiff had knowledge of his coming, and intention of having this commission executed." To the admissibility of this evidence,

*T. Buchanan*, for the plaintiff, objected, because there had not been legal notice to the plaintiff of the time of executing the commission.

*Key*, for the defendant, cited *Norwood vs. Owings*, (*ante* 98,) where this Court decided that notice was not necessary in executing foreign commissions.

CHASE, Ch. J. This case is not similar to that of *Norwood vs. Owings*. In that case the commissioners certified that they had given notice; but in this case it does not appear, by the return of the commissioners, that they had given any notice, or that proper notice had been given. The Court are of opinion that the commission and return are not legal evidence, nor any part thereof. The defendant excepted.

4. The plaintiff then offered to read in evidence the commission, with the testimony returned with it, which had been executed and returned at the instance of the defendant, under a commission issued from this Court to Fayette County, in Pennsylvania, on the 14th of March, 1798, but which the defendant refused to read. The return is as follows: "In obedience to a commission to us directed by the

**460** honorable the Judges of the General Court \* for the Western Shore of Maryland, we met at the house of James Gregg, in Fayette County, Pennsylvania, on the 1st of October, 1798, and after taking the oath directed, we appointed J. M. clerk, who took the oath directed in the said commission. We then put the following interrogatories unto Daniel Goodwin, of the county aforesaid, being first duly sworn on the Holy Evangely of Almighty God, viz: " [Then follow the interrogatories and answers.] "The foregoing interrogatories were taken at the instance of Joshua Stevenson, on his asserting that Mr. Cooke, attorney for the plaintiff, had knowledge of his coming, and intention of having this commission executed, and consented thereto. Given under our hands and seals," &c. Signed and sealed by the commissioners; and certificates that the commissioners and clerk had taken the oaths annexed to the commission to be by them respectively taken. The plaintiff also offered to read in evidence the deposition of Daniel Goodwin, named in the same commission, who at the former trial attended Court, and his deposition taken in the City of Annapolis on the 23d of May, 1799, before a

justice of the peace, &c. by consent of parties, to be read at the trial of this cause, so far as the same contained legal testimony.

CHASE, Ch. J. This commission is liable to the same objection as the other commission, and the Court refuse to admit it to be read, being of opinion that the commission was not legally executed; and that the deposition taken in Annapolis, by consent of parties, was taken for the purpose of impeaching or counteracting the deposition taken under the commission. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff brought a writ of error to this Court.

The cause was argued on the bill of exceptions taken on the part of the plaintiff, being the last bill of exceptions, herein stated, before BUCHANAN, NICHOLSON, GANTT, and EARLE, JJ. by

*T. Buchanan*, for the plaintiff in error; and by

*Shaaff*, for the defendant in error.

*Judgment affirmed.*

\* MORRISON *vs.* GALLOWAY.

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In an action of covenant, brought on the 11th of February, 1799, upon an agreement executed on the 18th of March, 1796, between M. (the plaintiff,) and G. (the defendant,) stipulating *inter alia* that a complete merchant mill should be built by M. of materials to be provided by G. who was also to provide a framed or hewed logged dwelling-house at the mill, for M. to reside in, and M. agreed that he would take up his residence at the mill in the dwelling-house, and would act as the manager and superintendent of the mill, which was to be worked for the joint benefit of M. and G. in equal parts, M. to receive one-half of the net profits, and G. the other half. The copartnership to commence as soon as the mill should be ready to do work, and continue for ten years. That a regular set of books should be kept, which should contain all the transactions of the copartnership, and a settlement should be effected at the end of every year. The firewood should be furnished from the farm on which G. resided, for the use of two fire-places in the mill and dwelling-house, at the equal cost of the parties for cutting and hauling it to the house; and 12 acres of land, including two acres of bottom land most convenient to M. to be put under good and sufficient fence for his use. The declaration averred, that the mill was completed on the 21st of June, 1798, and that M. performed, &c. The breach assigned was, that G. did, on the 31st of January, 1799, forcibly eject M. from the mill and premises, and still keeps him out. That G. did not provide a framed or hewed logged dwelling-house at the mill for M. to reside in. That G. on the day and year last aforesaid, after the mill was complete and put into complete motion, did prevent M. from receiving one-half of the net profits of the mill, but that G. did, contrary to the consent of M. receive the whole of the profits from the day and year last aforesaid, until the bringing of this action, and hath refused to pay any part thereof to M. Nor did G. furnish M. with 12 acres of land, including two acres of bottom land most convenient to M. under good and sufficient fence for M's use. The witness to the agreement was offered by

G. to prove what took place between G. and M. previous to and at the time of the agreement, as to their intention and meaning in the agreement; also another witness, who proved that when he was at work upon the dam for the mill, he received orders from G. to build the dwelling-house for M. but that M. told him to continue to work at the dam, and not to mind the house, as he could make a shift with the counting room in the mill, which he occupied, and declared that it answered his purposes very well, and that there was no occasion to build the dwelling-house until it suited the convenience of G. *Held*,

1. That the construction of the agreement is a matter of law to be determined by the Court. That parol evidence may be admitted to explain doubtful parts; but no evidence can be admitted to prove the agreement different, or to prove any additional agreement not included in or touched upon in the agreement. That the evidence offered did not discover or extinguish the contract, or bar the plaintiff's cause of action against the defendant for the breach in not building the house; that it was only a consent to a temporary suspension of the building of the dwelling-house, and is only proper in mitigation of damages. (a)
2. That at the time of bringing the action, the plaintiff had a cause of action, being deprived of the benefits under the contract.
3. That the covenant on the part of the defendant, that the plaintiff should receive one-half of the profits of the mill, is an independent covenant; and that it was not incumbent on the plaintiff, to entitle himself to a recovery, to prove a compliance with or fulfilment of every stipulation in the covenant on his part to be performed.
4. That it was not necessary for the plaintiff, in order to support his action, to prove that he took up his residence at the mill, and superintended the same as miller, and devoted his time and attention to the mill, in such manner as is usual for men under wages to do particular work; that he kept a regular set of books, in which were contained all the transactions of the copartnership, and that he effected a settlement of the partnership accounts at the end of the year 1798, or that he was prevented from doing so by the defendant. That it was only necessary for the plaintiff to prove that he did enter upon the management and superintendence of the mill according to the covenant, and did work and manage the same.
5. That for withholding from the plaintiff the one-half of the profits of the mill, he could only recover therefor from the time when such withholding of the profits first commenced down to the time when the action was brought.
6. That the plaintiff might recover damages for one-half of the net profits of the mill, down to the time of bringing the action only; and damages for the ejecting and turning him out of the possession of the mill, and for all advantages and benefits which might attend or result from the possession thereof, during the unexpired term of ten years, not comprehended within the net profits of the mill; and that an action or actions may be brought by the plaintiff against the defendant, for one-half of the net profits which might have been made, or may be made, from working the mill under the contract, from the 11th of February, 1799, during the continuance of the partnership under the same.
7. That this being an action founded on contract, the plaintiff had only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by

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(a) See *Bladen vs. Wells*, 30 Md. 577; *Warfield vs. Booth*, 33 Md. 63.

him, (exclusive of his part of the profits of the mill,) according to the whole of the circumstances existing in the case, without reference to force, if any, with which the plaintiff was dispossessed.

8. That it was no ground to arrest the judgment upon the verdict, (which was for the plaintiff,) because the declaration stated, as a breach on the part of the defendant, the not enclosing the 12 acres of land, &c.

**APPEAL** from Washington County Court. This was an action of covenant, brought by the appellant in the late General Court on the 11th of February, 1799, upon the following articles of agreement entered into between him and the defendant, (now appellee.) "Articles of agreement made this 18th of March, 1796, between William Morrison, of," &c. "and Benjamin Galloway, of," &c. "Whereas it is the intention of the said Galloway that a complete merchant mill shall be erected at a seat on Chew's Farm, in Washington County, and said Morrison is willing to execute  
 \* the said building. Be it remembered, that the parties afore- **462**  
 said have agreed, and by these presents do agree, each with the other, that they will respectively do and perform the following engagement, agreeable to the plain intent and meaning thereof; that is to say, it is agreed on the part of said Galloway that he will provide all the necessary materials for erecting and finishing said mill, and deliver them to said Morrison, at said mill-seat, in good order, and will also provide for said Morrison, and his workmen, meat, drink, washing and lodging, during the time of building said mill; the rafters, joists, studs and braces, to be sawed; the mill-house to be 40 feet by 44 feet, or 45 feet square, as said Morrison shall determine; to be two stories high, and an hipped roof; the foundation to be stone work; the superstructure of the mill to be framed work, and weather boarded and shingled; a counting room to be in the mill; and said Galloway to find a proper desk for the same; said Galloway to provide a framed or hewed logged dwelling-house, 24 by 20 feet, with a brick chimney, at said mill, for said Morrison to reside in; said Galloway further agrees to furnish, in due time, all articles necessary towards putting said mill in complete motion to do merchant and country work, as said Morrison may call on him for them, said Morrison taking care always to give said Galloway sufficient notice to enable him to provide the same; said Morrison agrees, on his part, that he will hew the timber, frame the mill-house as before mentioned, weather board it, and shingle the roof; make doors, windows and stairs; make two water wheels; start three pair of burr stones, four bolting cloths, rolling screen and fan, and make hoisting gears within and without, and bolting chest. *Item.*—Said Morrison engages to complete the above work, after the proper foundation walls are built, for the sum of £450 current money. *Item.*—It is agreed on the part of said Morrison, that he will take up his residence at said mill, in the dwelling-house aforesaid, and will act as the manager and superintendent of said mill, which is to be worked

for the joint benefit and advantage of said Morrison and Galloway, in equal parts; that is to say, said Morrison to receive one-half of the net profits and said Galloway the other half; said Morrison to engage the necessary persons to be employed in working said mill, and to remove them whenever he thinks proper; the money capital

**463** \* for the use of said copartnership to be provided in equal proportions by said parties. It is further agreed, that this copartnership shall commence as soon as the mill shall be ready to do work, and shall continue between the parties aforesaid for the space of ten years; but it is understood, that in case of the death of said Morrison, before the end of said ten years, then this copartnership is to be dissolved immediately after such event shall take place. It is agreed that a regular set of books shall be kept, which shall contain all the transactions of the copartnership, and a settlement of the partnership accounts shall be effected at the expiration of every year. It is understood between said parties, that said Morrison shall never claim any wages for his management and superintendence of said mill, and the said business; nor shall said Galloway ever charge said Morrison with any rent for the use of the said mill; but that the one shall always be considered as a full satisfaction for the other; the firewood shall be furnished from the farm on which said Galloway now resides, for the use of two fire places in said mill and dwelling-house, at the equal cost of the said parties for cutting and hauling it to said houses; and 12 acres of land, including two acres of bottom land most convenient to said Morrison, to be put under good and sufficient fence for his use. The hogs that may be supported by the sweepings and offals of said mill shall be considered as the joint property of the parties aforesaid; and the said Galloway is to employ, at his expense, a person to get the shingles to cover said mill and dwelling-house. In testimony whereof the parties aforesaid have hereto set their hands, and affixed their seals, the day—Said Galloway agrees to pay to said Morrison such money as he shall require during the time he is engaged in the building of said mill, and the balance of his account at the time of completing the same.” It was signed and sealed by the parties. The declaration alleged, that although the plaintiff had well and truly done every thing on his part to be done, according to the form and effect of the covenant, and did well and faithfully complete the mill on the 21st day of June, 1798; and although he was always willing and ready to take up his residence at the mill, in the dwelling-house mentioned in the articles of agreement, and offered so to do; and although he was ready and willing at all times to act as the manager and superintendent of the mill, \* and offered so to do; and he **464** was always ready and willing to keep a set of books to contain the transactions of the copartnership, and that a settlement of the partnership accounts should be effected at the expiration of each year—Yet the defendant did afterwards to wit, on the 31st day of

January, 1799, at, &c. forcibly, and against the consent of the plaintiff, eject and turn him from the mill and premises, and always hitherto hath, and still doth, keep him from the same; nor did the defendant provide a framed or hewed logged dwelling-house, 24 by 20 feet, with a brick chimney, at the mill, for the plaintiff to reside in, according to the covenant; but the defendant afterwards, &c. after the mill was complete, and put into complete motion, did prevent the plaintiff from receiving one-half of the net profits of the mill; but the defendant did, contrary to the consent of the plaintiff, receive the whole profits for a long space of time, to wit, from, &c. until the day of the impetration of the original writ in this cause, and hath refused to pay or deliver any part to the plaintiff, although often requested so to do. And the plaintiff in fact avers, that the one-half of the net profits of the mill, for the time aforesaid, was and still is of the value of £2,000 current money, to wit, &c. of which the defendant had notice. Nor did the defendant furnish the plaintiff with 12 acres of land, including two acres of bottom land most convenient to the plaintiff, under good and sufficient fence, for the plaintiff's use, but wholly refused, and still doth refuse, to furnish the land, or any part thereof, as by the articles of agreement he was bound to do; and so the plaintiff saith that the defendant hath not performed, fulfilled, kept and observed, the covenant between them made, but has broken the same; and hath hitherto wholly refused, and still doth refuse, to perform it to the plaintiff; wherefore the plaintiff saith he is injured, and hath sustained damage to the value of £5,000 current money, &c. It was agreed between the counsel, to enter a general plea or performance of all the covenants, and take issue thereon, with leave to the defendant to give any thing in evidence which he might have pleaded in bar; and that all errors should be released except substantial errors in the declaration.

1. At the trial in the General Court at May Term, 1803, Dennis Davis, a witness, proved, that in the summer 1797 he received orders from the defendant to build the dwelling \* house in the declaration mentioned, and to take the slaves of the defendant 465 to get and prepare the logs for that purpose, and to put them up. This direction was communicated to him by letter, the defendant being then absent from home at Bath, in Virginia. That he, the witness, was at that time at work with the slaves of the defendant upon the dam for the mill. That the witness being about to execute the above orders of the defendant, told the plaintiff that he was about to take away the hands of the defendant from the dam; the plaintiff asked for what, he told him to build his house; the plaintiff told him to continue to work at the dam, and not to mind the house, that he, the plaintiff, could make a shift with the counting-room finished in the mill; that in consequence of this request of the plaintiff, he at that time refrained from building the house, and continued working upon the dam until the cold weather prevented him;

that he began again to work upon it in the spring 1798, and did not finish it until some short time before the mill was completed, which was on the 21st of June, 1798. That the witness was the overseer of the defendant for the years 1797, 1798, 1799. That he never after received any instructions from the defendant to get the logs for the house, and that none were ever got. That at this time the plaintiff was a single man, and that the room in the mill was a large comfortable room, with a fire place in it. The defendant then proved, that after the mill was completed, the plaintiff occupied the room in the mill, and in conversation with Peregrine Fitzhugh, declared to him that the room answered his purposes very well, and that there was no occasion to build the dwelling-house until it suited the convenience of the defendant. The plaintiff offered no evidence to the jury that he ever called upon the defendant to build the dwelling-house, or requested it to be done. That on the 31st of January, 1799, the defendant dispossessed the plaintiff of the mill, and kept him out ever after. On these facts the defendant prayed the Court to direct the jury, that the plaintiff had no cause of action against him for the alleged breach of covenant in not building the dwelling-house.

*Mason and J. Buchanan*, for the defendant, cited *Jones vs. Barkley*, 2 Dougl. 684, 687; and 1 Roll. Ab. 453, N. pl. 5.

**466** \* *Martin*, (Attorney-General,) for the plaintiff, cited *Littler vs. Holland*, 3 T. R. 590.

CHASE, Ch. J. The construction of the agreement is a matter of law to be determined by the Court. Evidence may be admitted to explain doubtful parts; but no evidence can be admitted to prove the agreement different, or to prove any additional agreement not included in, or touched upon in the agreement.

The Court cannot give the direction prayed by the defendant. They are of opinion, that the evidence offered did not dissolve or extinguish the contract in this case, nor bar the plaintiff's cause or right of action, against the defendant, for the breach in not building the house; that it was only a consent to a temporary suspension of the building of the dwelling-house, and is only proper in mitigation of damages. The defendant excepted.

2. It appeared in evidence, that the mill was completed on the 21st of June, 1798, and continued in the possession, and under the direction of the plaintiff exclusively, until the 31st of January, 1799. That on this last day the defendant dispossessed the plaintiff, and from that time only, withheld from him any share of the profits. That on the 11th of February, 1799, the plaintiff instituted this his suit against the defendant. The defendant then moved the Court to direct the jury, that when this suit was instituted the plaintiff had



no cause of action against the defendant for withholding the profits of the mill.

CHASE, Ch. J. At the time of bringing the suit, the plaintiff had a cause of action, being deprived of the benefits under the contract. The Court cannot give the direction prayed. The defendant excepted.

3. The defendant then moved the Court to direct the jury, that the covenant on the part of the defendant, that the plaintiff should receive one-half of the profits of the mill, is dependent on the covenant, on the part of the plaintiff, to take up his residence at the mill, to superintend its management and direction for the joint benefit and advantage of both parties, to commence a copartnership as soon as the mill should be put in motion, and to keep a regular set of books containing all the transactions of the partnership concern; and that the plaintiff, to entitle himself to a \* recovery of one-half of the profits of the mill, must prove that he performed **467** his covenant in all its parts, or that he was prevented from doing so by the defendant.

*J. Buchanan and Warfield*, for the defendant, cited *Jones vs. Barkley*, Dougl. 684, 690; *Esp. Dig.* 284, 285; and *Glazebrook vs. Woodrow*, 8 T. R. 366.

CHASE, Ch. J. The Court are of opinion, that the covenant in this case is an independent covenant, and that it is not incumbent on the plaintiff, to entitle himself to a recovery, to prove a compliance with, or fulfilment of, every stipulation in the covenant on his part to be performed. The Court therefore refuse to give the direction prayed. The defendant excepted.

4. Upon the rejection of the testimony of the subscribing witness to the agreement as to the ideas of the parties respecting the agreement, and upon the statement in the second bill of exceptions, the defendant prayed the Court for their opinion and direction to the jury, that by the true construction of the articles of agreement, the plaintiff was bound to take up his residence at the mill, and superintend the same as miller, and to devote his time and attention to the mill, in such manner as is usual for men under wages to do particular work. That the plaintiff was bound to keep, and prove that he kept, a regular set of books, in which should be contained all the transactions of the copartnership, and that he was bound to effect a settlement of the partnership accounts at the expiration of the year 1798; and that unless he does show that he has done this, or that he was prevented from doing so by the defendant, he cannot sustain an action against the defendant upon this covenant, for dispossessing him of the mill on the 31<sup>st</sup> of January, 1799, and depriving him of the share of its profits from that time.

CHASE, Ch. J. The Court cannot give the direction prayed. They are of opinion, that it is not necessary for the plaintiff to prove any of the facts above specified, to support this action, except that he did enter upon the management and superintendence of the mill, according to the covenant, and did work and manage the same. The defendant excepted.

**468** \* 5. The defendant then prayed the Court for their direction to the jury, that if they should be of opinion that the plaintiff was entitled to recover from the defendant, for his withholding from the plaintiff the one-half of the profits of the mill, that he could only recover therefor from the time when such withholding of the profits first commenced, down to the time when this suit was brought.

THE COURT gave the direction accordingly.

6. The defendant then prayed the opinion of the Court, and their direction to the jury, that for the breach stated by the plaintiff, in turning him out of the mill on the 31st of January, 1799, and keeping him out thereafter, he can only recover damages for the actual deprivation of his possession, and the continuance of that deprivation down to the bringing of this suit, and not further; and that for all the subsequent damages which the plaintiff hath sustained for being deprived of the possession and profits of the mill, subsequent to the bringing of this suit, he may have a new action against the defendant, if in doing so the defendant has acted contrary to law.

*Mason and Warfield*, for the defendant, cited 3 *Blk. Com.* 157; and 1 *Bac. Ab. tit. Covenant*, 542, 546.

*Martin*, (Attorney-General,) and *Shaafl*, for the plaintiff, cited *Nurse vs. Barns*, Sir T. Raym. 77.

CHASE, Ch. J. The Court are of opinion, that the plaintiff may recover damages for one-half of the net profits of the mill down to the time of instituting this suit only; and damages for the ejecting and turning the plaintiff out of the possession of the mill, and for all advantages and benefits, which might attend or result from the possession of the same, during the unexpired term of ten years, not comprehended with the net profits of the mill; and that an action or actions may be brought by the plaintiff against the defendant, for one-half of the net profits which might have been made, or may be made, from working the mill under the contract, from the 11th of February, 1799, during the continuance of the partnership under the same. The plaintiff and defendant both excepted to this opinion of the Court.

**469** \* 7. The defendant then prayed the Court to direct the jury, that in this case the plaintiff had only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him; and that

this being an action sounding in contract, it was not a case in which it was proper for the jury to give vindictive damages.

CHASE, Ch. J. The Court are of opinion, that this being an action founded on contract, the plaintiff has only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him, (exclusive of his part of the profits of the mill), according to the whole of the circumstances existing in the case, as they appear in evidence to the jury, without reference to the force, if any, with which the plaintiff was dispossessed. The plaintiff excepted.

Verdict for the plaintiff, and damages assessed to £168 15 0 current money. There was a motion in arrest of judgment, and the following reason was assigned: Because the plaintiff hath stated in the declaration, as a breach of the covenant, on the part of the defendant, that he did not enclose twelve acres of land most convenient to the mill, in the declaration mentioned, two acres whereof was bottom land, and cause the same to be put under a good and sufficient fence for the exclusive use of the plaintiff; upon which pretended breach of covenant the jury have assessed damages to the plaintiff, when in fact it was the duty, by the articles of agreement, of him the plaintiff, and not of the defendant, to have enclosed said twelve acres of ground at the joint expense of the plaintiff and defendant.

*Curia adv. vult.*

Upon the abolition of the General Court, this case was transferred to the County Court of Washington, in which Court, at October Term, 1806, judgment on the verdict was arrested by SHERIVER, A. J. and the plaintiff appealed to this Court.

The cause was argued before CHASE, Ch. J. NICHOLSON, GANTT, and EARLE, JJ.

*Shaff*, for the appellant. This case does not come up on any of the bills of exceptions taken at the trial of the \* cause. The sole question for this Court is, whether the County Court were **470** right in arresting judgment on the verdict. The breaches in the declaration, which have been made the ground for the motion in arrest of judgment, as stated in the reasons filed, are that, "the defendant did not enclose twelve acres of land most convenient to the mill, in the declaration mentioned, two acres whereof was bottom land, and cause the same to be put under good and sufficient fence for the exclusive use of the plaintiff." Now the declaration does not allege the breach as stated in the reasons. The breach, as laid in the declaration, is "nor did the defendant furnish the plaintiff with 12 acres of land, including two acres of bottom land, most convenient to the plaintiff, under good and sufficient fence, for the plaintiff's

use, but wholly refused," &c. in the words of the agreement. The meaning of which is, that Galloway was to furnish the land enclosed, and that it was not to be at the joint expense of the parties. The preceding clause in the agreement saying, that the firewood, &c. should be at the equal cost of the parties, did not make it a covenant that the 12 acres should be enclosed at the joint expense. They are separate covenants. It is not usual for a man to covenant to furnish himself; and as this was for the benefit of Morrison, it must be Galloway's covenant. The costs of cutting the firewood, &c. has nothing to do with what follows respecting the land to be enclosed. After verdict, the Court are to infer from the expressions in the declaration, that Galloway did not, according to the agreement, furnish the land, and enclose it as by the covenant he was bound to do, and that the jury found that he did not furnish and enclose according to the covenant. The declaration does not state at whose expense the enclosing was to be. It was to be done for the use of Morrison. The firewood was to be furnished at the equal expense of the parties.

If the judgment is reversed, by the Act of 1800, ch. 69, this Court are to give such judgment as the Court below ought to have given. The judgment here has been arrested, and if the judgment of arrest is reversed, unless the Court give judgment under this Act, the appellant has no remedy but a new action.

*T. Buchanan*, for the appellee.

**471** \* *Martin*, in reply, was stopped by the Court.

*Judgment reversed, and judgment  
for the appellant on the verdict, &c.*

#### SMITH *et al.* vs. THE STATE.

By the Acts of Confiscation, the equitable interests of British subjects, in lands in this State, were confiscated without office found, or entry, or other act done, and although such equitable interests were not discovered until long after the treaty of peace.

APPEAL from a decree of the Court of Chancery. Bill filed in the name of the State, at the instance and for the use of Carroll and Maccubbin.

HANSON, C., decided, that by the Act of October, 1780, ch. 45, "to seize, confiscate and appropriate, all British property within this State," and the Act of the same session, ch. 49, "to appoint commissioners to preserve confiscated British property," the equitable interests of British subjects in lands were confiscated without office found, or entry or other act done, and although such equitable interests were not discovered until long after the treaty of peace

between Great Britain and the United States. [See the decree \* of the Chancellor, as reported in 6 *Cranch*, 286.] From that decree the defendants appealed to this Court. **472**

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, and GANTT, JJ. by

*Johnson*, (Attorney-General,) for the appellants; and by

*Ridgely*, for the appellee.

*Decree affirmed.*

The appellants brought a writ of error to the Supreme Court of the United States, where the decree of this Court, affirming that of the Court of Chancery, was affirmed. See 6 *Cranch*, 286.

#### THE ATTORNEY-GENERAL *vs.* JARRETT.

A certificate of survey was returned to the land office for a tract of land called B. J. surveyed on the 19th of April, 1794, for A. J. On the 8th May, 1797, A. J. obtained a warrant of resurvey on W. C. and in his resurvey made on the 1st of May, 1798, he included B. J. and called the land B. S. On the 10th May, 1798, A. J. obtained a proclamation warrant on his own certificate of the land called B. S. and had it executed on the 29th April, 1799. But D. W. had, on the 20th Feb. 1798, obtained a proclamation warrant on B. J. and had it executed on the 22d of May, 1798, and called the land B. C. A. J. paid the composition money on B. S. on the 8th of May, 1799, and D. W. paid the composition money on B. C. on the 9th of May, 1799. Both certificates were caveated by the opposite party; and the Judge of the land office ordered a grant to issue to A. J. for the land called B. S. To vacate which grant a bill was filed in the Court of Chancery, in the name of the attorney-general, at the relation of D. W. Decreed, that the bill be dismissed.

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint which was brought in the name of the Attorney-General, at the relation of West, to vacate a grant obtained by Jarrett for a tract of land called Belgrade. The facts in the case were these: The relator's title.—On the 19th of May, 1794, A. Jarrett returned a certificate of survey to the land office, for the land called Belgrade, (the first,) containing 1,089 acres. On the 20th of February, 1798, West obtained a proclamation warrant thereon, no person having proclaimed the certificate. On the 22d of May, 1798, West returned a certificate, under his proclamation warrant, and called the land The Buckskin, containing 228 acres. On the 9th of May, 1799, the composition money was paid by West. On the 3d of June, 1799, West's certificate was caveated by A. Jarrett. On the 10th of February, 1800, the Judge of the land office, on a hearing of the caveat, passed an order for correcting the certificate, by excluding part of a tract of land called Johnson's Enlargement, which appeared to be included in the certificate of The Buckskin. On the

30th of June, 1800, a corrected certificate was returned by West, containing 200 acres, excluding 28 acres, part of Johnson's Enlargement. On the 10th of October, 1800, the corrected certificate was caveated by J. Jarrett, the defendant; \* and on the 20th of **173** April, 1801, the Judge of the land office ruled the caveat good; and a grant was refused to West, because the land was included in another certificate, and granted to the defendant by the name of Belgrade, (the second.) This certificate of Belgrade, (the second,) the relator alleged was younger than West's, and that the grant was obtained thereon during the contest under the caveats. That the defendant had notice of West's certificate.

The defendant's title.—On the 1st of May, 1798, A. Jarrett returned to the land office another certificate of survey for Belgrade, (the second,) containing 767 acres, under a warrant of resurvey issued on the 8th of May, 1797, to resurvey Wild Cat Den. On the 10th of May, 1798, A. Jarrett proclaimed his own certificate for Belgrade, (the second.) On the 29th of April, 1799, A. Jarrett returned a certificate under the proclamation warrant, and called the land Belgrade, (the second,) containing 92 acres, excluding the rest. On the 8th of May, 1799, A. Jarrett compounded on this last certificate. On the 30th of September, 1799, the certificate was caveated by West. On the 10th of February, 1800, the Judge of the land office dismissed the caveat of West; and on the 20th of October, 1800, a grant issued on the certificate to the defendant, he having obtained an assignment thereof from A. Jarrett. The bill prayed that the grant for the land called Belgrade, issued to the defendant, might be vacated, and for further relief, &c.

HANSON, C. (February Term, 1805,) decreed, that the bill of complaint be dismissed, but without costs. From this decree the complainant appealed to this Court.

The case was argued at June Term, 1808, before POLK, BUCHANAN, NICHOLSON, and GANTT, JJ. by

*Hall* and *T. Buchanan*, for the appellant; and by

*Johnson*, (Attorney-General,) for the appellee, and was re-argued at the present term before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, JJ.

*T. Buchanan*, for the Appellant, cited *Land Hold Asst.* 186, 275, 359, 362, 319, 361, 469; and the Act of 1785, ch. 88, s. 10.

\* *Martin*, and *Johnson*, (Attorney-General,) for the appellee, **474** cited *Attorney-General vs. Snowden*, 1 H. & J. 332.

*Decree affirmed.*

## WILLIAMS vs. HODGSON.

A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity. (a)

Ignorance of the law, as to the consequences of a creditor's accepting the bond of one of the partners for a simple contract debt, due from the partnership, is not a ground for relief in equity. (b)

Such a bond, although not binding on the partner who does not execute it, is obligatory on the one executing it. (c)

A complainant is not entitled to relief in Chancery against the executors of a joint obligor, who was a surety in the bond. Per HANSON, C. (*note.*) (d)

APPEAL from a decree of the Court of Chancery. The bill, which was filed by the appellee against Williams, (the appellant,) and John Clarke, stated that Williams and Clarke entered into partnership under the name of John Clarke & Co. During the partnership, Clarke bought goods from the complainant, (Hodgson,) which were delivered to Clarke on account of the partnership, and by him sold. That the belief that Williams was a partner, gave credit to the firm. That on the 7th of July, 1797, Clarke settled with the complainant, and the concern was found indebted £819 0 5, Virginia currency; and for that sum Clarke gave bond to the complainant, in the names of Clarke and Williams, (jointly and severally,) executed by Clarke alone, signed John Clarke & Co. That John Clarke & Co. being afterwards indebted to the complainant in \$598.34, and interest, for goods sold to John Clarke, for and on account of the concern, Clarke, for himself and Williams, on the 18th of November, 1797, gave another bond to the complainant, signed John Clarke & Co. That Clarke is insolvent, &c. That suits were brought on the bonds in the General Court against Williams, and were *non prossed*, because that

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(a) Affirmed in *Moale vs. Hollins*, 11 G. & J. 14, where the Court said: "That the substitution of a debtor's obligation of a higher nature, for a debt due by him of inferior degree, works an extinguishment of his original liability has not been, and upon authority could not be controverted. And that the same extinguishment takes place when the substituted obligation of a higher nature is executed by one of two partners, or other persons jointly bound, is now well settled." Cf. *Brown vs. Duncanson*, 4 H. & McH. 221, *note* (a); *Davidson vs. Kelly*, 1 Md. 492.

(b) See *Kearney vs. Sascor*, 37 Md. 264; *Carpenter vs. Jones*, 44 Md. 625; *Gott vs. Carr*, 6 G. & J. 309.

(c) Cf. *Gable vs. Brooks*, 48 Md. 108.

(d) Approved in *Pickersgill vs. Lahens*, 15 Wallace, 144. But see Rev. Code, Art. 64, sec. 51; (Code, Art. 49, sec. 1;) *Zollickoffer vs. Seth*, 44 Md. 359.

Court were of opinion that one partner could not execute a bond, so as at law to bind his copartner, unless a special authority for such purpose existed. Prayer for a disclosure from the defendants, whether they were partners or not, and that they may be compelled to account with and pay the money due to the complainant, and for other relief, &c. The answer of Williams stated, that he and Clarke entered into partnership in October, 1795, for three years, in the milling and distilling business. Clarke was directed not to purchase merchandise on Williams' account, and he believes that Clarke sold goods on his own account. He does not know whether or not Clarke bought goods on the partnership account, and if he did, the answer insisted that the defendant \* was not liable. That he knew  
**475** nothing of the settlement or execution of the bonds. That suits were brought on the bonds, and *non prossed*, as stated in the bill, and that Clarke was insolvent. That the partnership was dissolved in 1798. Clarke was the acting partner; and the defendant never bought any goods for the partnership, and he does not know the consideration of the bonds.

Testimony was taken under commissions issued for that purpose.

The answer of Clarke, put in after all the proof was taken and returned, admitted all the facts alleged in the bill.

KILTY, C. (February Term, 1806.) The objects of the bill, as stated therein, were to have a disclosure from the defendants, whether they were partners; to compel them to account with the complainant, and pay the money due as charged in the bill, on account of goods sold to them, and to obtain other relief.

As a ground for relief the complainant states, that during the continuance of the partnership, Clarke gave a bond to him in his own name, and that of Williams, for a balance due on account of goods sold to them, and afterwards another bond was given on a similar account, on which suits were brought against Williams in this State, and *non prossed*, on the ground of such bonds not binding him at law.

The answer of Williams denies the partnership to the extent alleged by the complainant, and does not admit the purchase of the goods by Clarke; the settlement or execution of the bonds. It admits that Clarke is insolvent, and that suits were brought on the bonds, and *non prossed* as stated in the bill.

The defence set up is, that the remedy, (being for the price of goods sold,) is at law, and that it is not a case for relief in equity, and that the bonds relied on as a ground of relief by the complainant, are not proved. And it is also contended that an issue should be tried as to the partnership, &c. and that the question of law should be submitted to the Judges.

The counsel for the complainant relies on the facts disclosed  
**476** in the case, to support the jurisdiction and the \* relief prayed



for; and also contends that the demand being against the defendants as partners, gives the Court of equity a concurrent power with a Court of law; and so as to the prayer for a discovery.

Upon this question of jurisdiction, the case is attended with considerable difficulty, and the authorities on the subject have been carefully examined with a view to its decision.

The position laid down by the complainant is certainly too broad. A prayer for a discovery, which is made a part of every bill in calling on the defendant to answer, cannot give a jurisdiction in every case, nor can the circumstance of the defendants being partners give such jurisdiction in a case purely determinable at law.

If therefore the complainant had merely stated a sale, and delivery of goods, and had brought his bill to recover the price, or if instead of a bond, a note unsealed had been given by Clarke, the complainant would not have been so ill-advised as to have prayed for relief in this Court, or if he had, would have failed to obtain it.

But there are circumstances in this case which, under the principles recognized by Courts of equity, incline the Chancellor to think that the jurisdiction may be sustained.

It is certainly desirable that the boundaries between the Courts, as to their jurisdiction, should be prescribed, but they are not in all cases to be clearly discovered, and a writer of eminence observes, that "to strike out the distinguishing principle upon which Courts of equity in such cases have proceeded, would be indeed extremely useful, but that after having given considerable attention to the subject, he found himself incapable of reconciling the various decisions on it."

In addition to the maxim, that matters of account, fraud, accident and mistake, are proper objects of a Court of equity, there are other principles which require to be considered in viewing this case. Although a Court of equity will not generally give relief where the party has a remedy, or the matter is properly determinable at law, yet to prevent such relief, it must be a case which can be fully investigated, and receive a complete and effectual decision in a Court of law, and the remedy there must be clear and certain.

\* In many cases a Court of equity will exercise jurisdiction although a remedy might be had in a Court of law. **477**

There are some cases in which, although the complainant might have a remedy at law, a Court of equity having obtained jurisdiction for the purpose of discovery will retain the suit for the purpose of giving relief; and if this rule was more general than it is, it would only be an extension of the principle in bills for account of assets, which are stated to have been originally only bills for discovery, which could not be had without an account, but on which the Courts of equity have made complete decrees, and given the party his debt likewise.

Equity jurisdiction is exercised to put a bound to vexatious and oppressive litigation, and to prevent a multiplicity of suits.

It is exercised where the Courts of ordinary jurisdiction are made instruments of injustice.

A Court of equity will lend its aid whenever by fraud or accident a person is prevented from effectually asserting, in the Courts of ordinary jurisdiction, rights founded on principles acknowledged by those Courts, and where parties by contract have given a right, but have not given a sufficient remedy, and in the case of defective securities for money.

The present case may not perhaps come under the scope of all these principles, but there are some of them which appear to be applicable to it.

Without stating particularly the evidence in the cause, the Chancellor is satisfied of the existence of the partnership, as alleged by the complainant, and of the liquidation of the balance due for the goods sold, the execution of the bonds as stated, and the event of the suits on them. With regard to the answer of the defendant, Clarke, it is considered, that the partnership being proved by other testimony, his admissions are evidence in the same manner as his acts would be in the exercise of the joint business of the firm. And it may here be observed, that the responsibility of one partner for the acts of another, is not, as stated by the defendant's counsel a principle of sheer mercantile law, but is founded in justice and necessity, and is inseparable from the nature of partnership transactions.

It appears that Clarke executed the bonds with a view of ascertaining, and perhaps of securing in some degree, the balance due for goods sold to the company; and these bonds \* were taken by the complainant from a misapprehension or ignorance of their legal effect.

If notes had been given by Clarke, without seal, as in the case of Riddle (a), and the partnership had been proved, they would have been obligatory on the defendant, Williams, at law. The bonds cannot be considered in equity as less solemn and obligatory than the notes, but the remedy sought for on the bonds was defeated by what was indeed a sheer principle of law. For if it be proved, as the Chancellor conceives it to be, that the defendant Williams, was liable, and might have been bound by notes, without seal, for the same amount, the defence set up to the bonds was not an equitable or conscientious one.

In this respect then the Court of law, or (as expressed in one of the principles above stated,) the Court of ordinary jurisdiction, has been made the instrument of injustice. By the accident, as it may

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(a) He brought a suit at law on such a note executed by Clarke & Co. against Williams and recovered judgment.

be termed, of the balance due being secured by bonds, the complainant was prevented from asserting in a Court of law the right of recovering money due to him on principles acknowledged by all Courts.

The parties who purchased the goods have, by the authorized acts of one of them, given (by their contracts,) a right to the money admitted thereby to be due, but have given a remedy insufficient at law, by securities, in that respect, defective.

It is alleged, by the counsel for the defendants, that the complainant, if the money is due to him, has a full and adequate remedy at law; and to prove this, he contends that the bonds are not an extinguishment of the original contract. If the bonds were obligatory on Clarke, (which seems to be admitted,) it is difficult to say how the original contract, which was a joint one, remains unimpaired, or how Clarke, if solvent, would be liable on both.

If an absolute decision on this question was necessary, it would appear consonant to reason that an unliquidated claim, sounding in damages, would be extinguished by the acceptance of an instrument of a higher nature, which fixed the amount. But supposing this to be left in doubt, has the defendant succeeded in showing that the complainant's remedy, (supposing him entitled) would be clear and \* certain in a Court of law, or that it would there be fully investigated, and receive a complete and effectual decision ? **479**

If equity jurisdiction may be exercised to put a bound to vexatious and oppressive litigation, and prevent a multiplicity of suits, it is not necessary to send a party to a Court of law, where the remedy, if to be attained, would be the same; and in this case it may be inferred from the evidence of J. Riddle, that if instead of bonds, notes unsealed, had been given, the same recovery would have been had as in *Riddle's Case*. And the same principle, in addition to the discretionary powers of this Court, will account for the Chancellor's not applying to a Court of law, as was suggested by the defendant's counsel.

The complainant has already tried his remedy at law, which has failed, as much at least through the fault of the defendants as his own; and it is not clear but that a suit in this Court might have been originally sustained on the ground of Williams not being bound in law by the bonds, though in that case the opinion of the Court or the Judges, as to the law, might have been resorted to.

In the case of a joint bond it is a constant practice, in case of the insolvency of the surviving obligor, to commence a suit in Chancery against the representatives of the other party; and although this arises in part from the acknowledged jurisdiction, as to administrators, &c. yet it is grounded also on the situation of the parties rendering the remedy of the law ineffectual.

With regard to the part of the bill praying for a discovery, it may be further observed, that as the binding of Williams, by the bonds

of Clarke, is alleged to have depended at law on the assent of Williams, an acknowledgment of such assent might have been expected by the complainant on filing his bill, which might have been a reason for filing it.

The Chancellor has stated his reasons at greater length than may be usual or necessary in such cases, on account of the doubts which he entertained at the trial. These doubts have been removed by the further consideration which he has given to the subject; and his opinion is grounded on the principles which he has stated, and on his determination, that where the merits appear to be with the complainant, he will not dismiss a bill on an allegation of the  
**480** \* want of jurisdiction, or any other similar objection, unless it is clearly and positively established. Decreed, that the defendants pay to the complainant the sum of £1,023 15 6 current money, with interest thereon, &c. and the costs of this suit. From this decree the defendant, Williams, appealed to this Court.

The cause was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, JJ.

*Shaff* and *Magruder*, for the appellant, contended, 1. That there was no legal proof of a partnership between the appellant and Clarke. 2. That if the appellee had any right to recover against the appellant, his remedy, from the proof in the case, was at law, and not in equity; and 3. That the appellee had no right, either at law or in equity, to recover against the appellant. 1 *Harr. Chan. Pr.* 36, 41;  
**481** *Dorsey vs. Dorsey*, (a); \* *Peake's Evidence*, 96; *Wymark's Case*, 5 *Coke*, 74; 2 *Com. Dig. tit. Pleader*, (P. 1); *Harper vs. Hamp-*

(a) The case of *Dorsey's Ex'x vs. Dorsey's Ex'rs*, in the Court of Chancery at February Term, 1794, appears to be this. R. T. with J. D. his surety, executed their joint bond to E. D. in 1768, payable in 1769, and in 1788, a joint suit was brought against them at law upon the bond. During the pendency of the suit, J. D. died, his death was suggested, and judgment by confession was rendered against R. T. in 1790. The suit continued against J. D. and in 1791, it was entered abated. R. T. obtained a discharge under the insolvent law in 1788, and his trustee sold property belonging to the insolvent, on a credit, more than sufficient to pay all his debts. R. T. was always able to pay the debt sued for, until and after 1786, but no measures were taken for its recovery until the above suit was brought. The executors of J. D. had fully administered and paid away all the assets of the deceased: but they had notice from E. D. and a demand of payment was made of them within one year after the death of J. D. A bill was filed in Chancery in 1792, by E. D. (and on his death revived in the name of his executrix) against the executors of J. D. to be paid the debt due on the bond. The defendants, among other things, in their answers, relied upon the Act of Limitations:

HANSON, C. On every application to this Court, not grounded on positive law, when it appears, that no former decision is in all points applicable to the present case, the principles, on which the Court was originally insti-

ton, 1 H. & J. 710; *Desobry vs. Terrier*, (ante 219); *Bac. Ab. tit. Release*, (G;) *Bull. N. P.* 155; *Chitty's Plead.* 155; *Clement vs. Brush*, 3 *Johns. Cas.* 180; *Pierson vs. Hooker*, 3 *Johns. Rep.* 70; 4 *Vin. Ab.* 387; 1 *Fonbl.* 117, (note;) 2 *Com. Dig. tit. Chancery*, 476, 330, 331; and *Tom vs. Goodrick*, 2 *Johns. Cas.* 213.

\* *Key and Johnson*, (Attorney-General,) cited *Watson on* **482** *Part.* 40, 337, 458; *Higgins' Case*, 6 *Coke*, 46; *Abbott vs. Smith*, 2 *W. Bl. Rep.* 950; *Maddox vs. Jackson*, 3 *Atk.* 406; *Daricent vs. Walton*, 2 *Atk.* 510; and *Blk. Com.* 436.

tuted, are to be considered. Its jurisdiction, from the beginning, has been exercised in preventing men from taking unconscientious advantages of law, in obliging them to discharge trusts, and to perform reasonable engagements of every kind, either express or implied, and in relieving against fraud, or accident. But it never yet has been the professed business of this Court to compel men to do that, which neither they, nor the persons whom they represent, have engaged to perform, which the positive laws of the land do not enjoin, and which equity and good conscience do not demand. In some cases, indeed, which did not appear to come under known established principles, or to be embraced by former decisions, Chancellors have exercised their ingenuity in raising agreements by construction; provided nevertheless, that the performance of the thing, thus supposed to be contracted for, might fairly and reasonably be demanded. Hence it is that the condition of a bond to pay money has been construed an agreement, which equity ought to enforce, after the obligor has been discharged from the penalty at law. How far the first decision in such case was right, is perhaps questionable; for this plain reason, that the obligor was not, and could not be apprized of the power, which equity would afterwards assume, of compelling him to do that, which he never in any manner contracted to perform; the operation of a joint bond at law being this, that during the life of both obligors it is binding on both, and, after the death of one, the obligee can have recourse to the other only. However, the determination in the case of *Bishop and Church*, 2 *Ves.* 371, cited by the counsel on each side, must now be recognized as a law or rule for this Court; and whether that case applies sufficiently to the present is to be examined.

The two cases appear to agree in every point, except one; but that one point, in which they differ, is important. In the former case, executors of a joint obligor were called on to pay money lent to the testator and the other obligor, who were partners in trade, and the constructive agreement of the testator, was on a substantial consideration. But, in the present case, the executors are called on to pay money which never was, or intended to be, participated by their testator. The constructive agreement therefore, on which alone this Court could decree against them, was voluntary, and such as, without special circumstances, ought not to be enforced. What then are the special circumstances of this case? To say nothing of the lapse of time, and the neglect of the complainant. He has it still in his power to obtain the debt from the trustee of the surviving obligor. In short, it appears to the Chancellor, that a decision in favor of the complainant would go far beyond any former determination, and that former determinations, with respect to joint obligors, have gone quite far enough. On the point relative to the Act of Limitations, it is not necessary to decide—Decreed, that the bill be dismissed.

CHASE, Ch. J. delivered the opinion of the Court. The Court have considered the bill, answer and proof, in this case, the arguments of counsel, and the decree of the Chancellor; and admitting the proof to be sufficient to establish a partnership between Williams and Clarke in the extent charged in the bill, in opposition to the answer of the defendant, and admitting also that the bonds mentioned in the bill, as executed by Clarke, under the signature of Clarke & Co. have been fully proved, it appears to the Court that the complainant is not entitled to any relief in equity, and that the decree of the Court of Chancery ought to be reversed.

It is a principle recognized by the Courts of law and equity, that a bond given by one partner for a simple contract debt due from the partners to the creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt.

It is also established by the Courts of law and equity, that ignorance of the law, as to the legal consequences resulting from such a bond, cannot excuse or form a ground for relief in equity, on the suggestion and proof that the party was mistaken as to the legal effects of such a bond, imagining at the time that it could not operate as a release to the other debtor, and that his responsibility still existed.

The Court are also of opinion, that the bonds set forth in the bill, although not binding on Williams, are obligatory on Clarke.

On these grounds the Court decide, that the decree of the Court of Chancery ought to be reversed.

BUCHANAN, J. I consider the partnership, alleged in this case to have existed between the defendants below, as sufficiently established to the extent charged in the bill, and that the delivery of the goods and merchandise, said to have been sold to Clarke, as acting partner, is fully proved.

**483** \* But if the bonds charged in the bill to have been passed by Clarke, in behalf of Williams and himself, were executed by him for the amount of those goods, the simple contract debts were not thereby severed, and continued open as to Williams, and destroyed as to Clarke, (on whom such bonds would be obligatory;) but being respectively joint, they became in law extinguished as to both. And though equity will interpose its aid where a remedy is wanting at law, the demand continuing, yet it cannot revive a debt which in law is extinguished.

If, however, such a bond could be construed to extinguish a simple contract debt as to the party signing it only, leaving it open as to the other partner for the interposition of a Court of Chancery, yet in this case the complainant has failed in proof to lay a foundation for a decree against Williams; for, as against him, the bonds in question which are set up in the bill as the very ground of the relief prayed, are not proven by any legal evidence exhibited in the record; and it cannot be seriously contended, that in the absence of such

proof, the Chancellor could hold jurisdiction over the case; for if no such bonds were executed by Clarke, the simple contract debt remains unimpaired, and the proper remedy is in a Court of law.

Upon the whole, I am of opinion that the Chancellor's decree, however consonant to strict justice, ought to be reversed.

*Decree reversed.*

### HALL vs. GRIFFITH.

An administrator must comply with an order of the Orphans' Court directing a sale of the personal estate of the deceased for the payment of debts, and cannot retain the property at the appraised value, on paying the debts out of his own funds to the amount of the appraisement. (a)

After payment of the debts of the deceased, and all legal costs and charges attending the administration, the administrator must deliver over the residue of the personal estate specifically to the representatives of the deceased. (b)

Where an administrator retained a part of the personal estate of the deceased, at the appraised value, and sold a part for the benefit of the estate, and a part as his own property—*Held*, that he must account for the increase of the slaves, and for the use, labor and hire of all slaves retained or hired by him; and where one of the slaves had run away, he must account for such slave at the appraised value, unless he used all reasonable endeavors to regain possession of such slave. He is to be allowed for money expended in clothing and maintaining such of the slaves as were unable to work, and in bringing up, clothing, &c. the increase of slaves, so long as they continued a charge. Also for all debts paid; for his commission, and all legal costs. He is to be charged with the amount of the inventory; with the sum gained on the sales of the property, and with the debts received. (c)

APPEAL from a decree of the Orphans' Court of Harford County. Griffith, (the appellee,) together with his wife Cordelia, since deceased, representatives of John B. Hall, deceased, by their libel, exhibited on the 18th of September, \* 1805, alleged to the Orphans' Court that Aquilla Hall, (now appellant,) the ad- **484** ministrator *d. b. n.* of John B. Hall, had made sales of sundry slaves, and other articles, belonging to the estate of the deceased, and had never accounted for the amount of the sales, but only for the amount of the appraisement. That the sales greatly exceeded the amount of the appraisement. That he retained in his hands sun-

(a) Affirmed in *Gavin vs. Carling*, 55 Md. 535; *Haslett vs. Glenn*, 7 H. & J. 22, and *Dennis vs. Dennis*, 15 Md. 144, holding that an executor cannot make the property of his testator his own, by paying the debts of the testator out of his own funds to the amount of the appraisement.

(b) See *Williams vs. Holmes*, 9 Md. 290; *Evans vs. Iglehart*, 6 G. & J. 192.

(c) Affirmed in *Edelen vs. State*, 4 G. & J. 280; *Gwynn vs. Dorsey*, *Ibid*, 461.

dry articles belonging to the estate, and has had the use, profit and labor, of sundry of the slaves, for which he never accounted. That sundry of the slaves, have had increase, which remain in his possession unaccounted for. Prayer for an account, &c. Hall, by his answer, stating that he was appointed administrator *de bonis non* of John B. Hall, some time in the year 1790, admitted, that before he obtained an order from the Orphans' Court for that purpose, he had sold sundry articles liable to waste, &c. on a credit, amounting, according to the appraisement, to £79 8 1, and according to the sales to £93 19 6, a part of which he had not received, owing to the insolvency of the purchasers. He admitted that he received sundry slaves, and other articles, as stated in the inventory, amounting to £723 2 4. That he obtained an order from the Orphans' Court to sell as much of the property as would pay the debts of the deceased, and it was understood, between the Court and him, that it was discretionary to sell or not, owing to the difficulty of selling property at that time for cash, and the order did not authorize him to sell upon credit. That he sold some of the slaves, and if he had sold all the property in the inventory for cash, it would not have discharged the debts of the deceased; and under that impression, and to save the real estate from being sold, he paid the debts out of his own money, and retained the personal property for the same. That upon settlement of his accounts with the Orphans' Court, they would not allow him to charge the estate with any interest, after 18 months from the date of his letters of administration, although he paid considerable sums of interest after that time. That one of the slaves had run away. That he had paid, and been allowed by the Orphans' Court, debts and commissions to a considerable amount more than the appraisement, viz. £820 13 11. He admitted the increase of some of the slaves, and that such increase was in his possession. That he was at considerable expense in supporting old, infirm

**485** \* slaves, and in bringing up, maintaining and clothing, the increase; and that he had since sold sundry of the slaves as his own property. The Orphans' Court decreed, that Hall ought to account for the sales of such part of the estate of the deceased as he had already sold, and that the residue of the estate, as contained in the inventory returned, he could not retain and keep at the appraisement, but that he ought to pursue the order of the Court of the 9th of August, 1791, which directed him to sell so much of the personal estate of the deceased, as might be sufficient to pay the debts. From this decree Hall appealed to this Court.

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, GANTT, and EARLE, JJ. by

Martin, for appellant; and Johnson, (Attorney-General,) for appellee.



CHASE, Ch. J. delivered the opinion of the Court. The Court are of opinion, that the appellant, as administrator *de bonis non* of John B. Hall, ought to have sold at public sale, pursuant to the order of the Orphans' Court made on the 9th of August, 1791, as much of the personal estate of the deceased as would have been sufficient to discharge and satisfy all the debts of the deceased, and all legal costs and charges attending the administration, and ought to have delivered over the residue of the personal estate, specifically to the representative of the deceased, the libellant in this suit; that the appellant had no right to retain the personal estate at the appraisement, on his paying the debts of the deceased to the amount of the appraisement. That the appellant account for the increase of the negroes, and for the use, labor and hire, of all negroes retained or hired out by him, and that he account for negro Corbin, (who ran away,) at the appraised value, unless the Orphans' Court shall be satisfied that the appellant used all reasonable endeavors to regain possession of that negro. That he be allowed all sums of money necessarily expended by him in clothing and maintaining such of the negroes, named in the inventory, as were not able to work and maintain themselves, and in bringing up, maintaining and clothing, the increase of any of the negroes, so long as they continued a charge. That he be allowed all sums of money \* paid by him to the creditors of the deceased, his commission, and all legal costs 486 and charges. That he be charged with the amount of the inventory, exclusive of the negroes—with the sum gained on the sales thereof; with the amount of the negroes sold; with debts received by him; and that an account be taken and made out in conformity to the principles and directions herein stated. That the appellant proceed to sell at public sale, for cash, as much of the personal estate as may be necessary to defray and satisfy any balance which may be due to the creditors of the deceased, and the appellant, on a settlement to be made pursuant to the principles aforesaid.—Decreed, that the decree of the Orphans' Court be reversed, and that that Court proceed, without delay, to compel the appellant, as administrator *de bonis non* of John B. Hall, to settle the estate in conformity to the principles set forth herein, and that the appellant deliver over to the appellee, the negroes which may remain in his hands after settling the estate in the manner above directed; and that the appellant pay to the appellee the costs by him incurred in this Court.

*Decree reversed, &c.*

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HOFFMAN vs. BAKER.

Where a bill was filed in Chancery, to set aside and annul a decree before obtained by the defendant against the complainant, on the ground of fraud practiced by the defendant in obtaining that decree, there appear-

ing to be no evidence of fraud, the bill was dismissed, but without costs. On an appeal to the Court of Appeals by the complainant, that Court affirmed so much of the decree as dismissed the bill, but reversed that part of it which directed that the dismissal should be without costs, and decreed that the appellant pay to the appellee his costs incurred in both Courts.

APPEAL from the Court of Chancery, dismissing the bill of the complainant, (now appellant,) which was filed on the 5th of April, 1802. The object and nature of the bill is stated in the decree.

KILTY, C. (July Term, 1806.) The object of the bill, as stated therein, and in the arguments of the counsel is to set aside and annul the decree heretofore obtained by the defendant against the complainant, in this Court in October, 1801, on the ground of fraud practised by the defendant in the obtaining that decree.

It becomes necessary therefore to examine how far this allegation is supported by the evidence in the present suit. This consists of the plot returned, by which the complainant contends, that it appears the locations of the lands in controversy are different from what they were represented to be in the former case. But this circumstance, supposing it to be clearly established, does not amount to a proof of fraud as to the former decree. One part of the testimony, \* admitted in the former case, was the deposition of **487** John Foster, which the complainant alleges was repugnant to the truth; and another was the certificate of Bell, as an assistant surveyor to Gist, which the complainant states was agreed by his counsel to be admitted as evidence upon the false suggestion of the defendant. Of this fact there appears to be no proof; and although fraud may be inferred from a variety of circumstances combined together, it is not to be presumed merely because the fact may on the present proof be different from what the evidence, admitted through mistake, showed it to be.

It is not necessary or proper to go into the former decree on the evidence then produced, and it must stand, unless it can be set aside according to the known and established principles of this Court. Decreed, that the bill of the complainant be dismissed, but without costs. From this decree the complainant appealed to this Court.

The cause was argued before CHASE, Ch. J. NICHOLSON, GANTT, and EABLE, JJ. by

*Johnson*, (Attorney-General,) for the appellant; *Shaff*, for the appellee.

THE COURT decreed, that so much of the decree of the Court of Chancery as dismissed the bill of complaint of the complainant be affirmed; and that that part of the decree which directs that the dismissal of the bill should be without costs, be reversed; and de-

creed that the appellant pay to the appellee all the costs incurred by the appellee in the Court of Chancery, and in this Court.

*Decree reversed, &c.*

SINGERY *vs.* THE ATTORNEY-GENERAL.

Where a Court of law admitted evidence to prove that a certificate of survey was forged, such evidence could have been deemed admissible, only on the ground, that if the certificate was proved to be forged, the grant obtained on it was fraudulent, and could have no operation in law to pass the land to the grantee.

Fraud may be inquired into as well at law as in equity; and where frauds are clearly established, the Courts of law and of equity have concurrent jurisdiction. (a)

Where the fact of the forgery of a certificate of survey, under the grant on which the defendant claimed, came before the Court and jury collaterally, and was not directly in question, the issue between the parties being, who had the right of possession to the land in controversy, the verdict in favor of the defendant, cannot be received as evidence to prove that the certificate was not forged.

The Court not having directed the jury that if they found the certificate forged, that nothing passed by the grant, it may be questioned, whether the verdict could conclude the plaintiff if the fact of forgery had been directly in issue.

On a bill in Chancery for vacating a certificate of survey and grant, on the ground of fraud, committed by a forgery of the certificate—*Held*, that the Court of Chancery had jurisdiction, although the question of forgery of the same certificate had, in an action of ejectment between the same parties come collaterally before a Court of law and jury, and although that Court admitted evidence to establish the forgery, and the jury gave their verdict in favor of the defendant, who claimed under the certificate alleged to be forged.

Although on a bill in Chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet that Court has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant, &c. from whence the injury has arisen, or will make such decree as the circumstances of the case render necessary. (b)

The forgery of a certificate of survey, and the fraud consequent thereon, being fully established. *Decreed*, by the Court of Chancery, that the defendant, (claiming under such certificate and the grant thereon,)

(a) In *Cook vs. Carroll*, 6 Md. 118, where it was held that fraud in the obtention of a patent cannot be inquired into in a Court of law, but can only be determined by a Court of equity or by the tribunal that issued the patent, the Court said that, although a majority of the Court in the case in the text were of the opinion that fraud might be examined into in a Court of law, as well as in a Court of equity, yet the case did not call for the expression of any such opinion, it being an appeal from a decree in Chancery.

(b) See *Salmon vs. Clagett*, 3 Bland, 145.

should convey to the complainant all that part of the land held by the defendant under such grant, and which is comprehended in the lines of of the tract of land granted to the complainant.

APPEAL from a decree of the Court of Chancery. The bill filed in the name of the Attorney-General, at the \* relation of **488** Ezekiel Boreing, on the 19th of November, 1799, stated, that in the year 1770, the surveyor of Baltimore County, being directed by the commissioners of the Lord Proprietary to survey and lay out, for any persons that might apply to him, any part of the Reserve land in that county, to enable them to contract with the commissioners for the purchase of such land, James Calder, as surveyor of the county, by virtue of the power and authority from the commissioners, did, on the 30th of September, 1770, survey and lay out for Singery, (the appellant,) a tract of land in the Reserve called Singery's Troutng Streams, containing 178 acres, and included within the courses and distances described in a certificate of the courses, taken from the original entry in the surveyor's books, &c. "Beginning at two bounded white oaks standing between two barren hills, at the end of the last line of a tract called Merryman's Mountain, (included,) and about W. 9 perches from George's Run, and running thence," (nineteen courses and distances, without calls,) "and thence with a straight line to the beginning, containing 178 acres, and called Singery's Troutng Streams, September 30th, 1770." That the certificate made out by Calder, as surveyor of the county, for Singery's Troutng Streams, to be returned to the land office, corresponded in all respects with the record of the courses kept by the surveyor himself as above described, but that Singery combining, &c. how to impose upon and defraud the Proprietary out of his land, and the purchase money which he would otherwise be entitled to, returned to the land office a certificate of the courses of Singery's Troutng Streams different from that which was made out by the surveyor, as will more fully appear by the certificate and plot of the land recorded in the land office. That in the true and genuine certificate of Singery's \* Troutng Streams, there is no call for "the beginning trees of Petticoat's Loose," but that the certificate returned to the land office by Singery, has this expression, which the relator expressly states was forged and inserted by Singery for the purpose of extending the twelfth line of the tract and thereby taking in more land than he was entitled to. That by the certificate, as made out by Calder before mentioned, Singery's Troutng Streams is made to contain 178 acres, but that by the certificate returned to the land office by Singery, that tract, by virtue of the call above mentioned, contains 560 acres, as Singery contends, though the certificate expresses only 178 acres, as will appear by a plot of the land exhibited, and which was made out and returned by the surveyor of Baltimore County to the General Court, in an action of

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ejection therein depending for the land between the relator's lessee and Singery. That Singery, on the 20th of April, 1775, obtained a patent on the said forged certificate, and thereby got 382 acres of land more than he was entitled to, or compounded for with the Proprietary, or his agents. That by virtue of two special warrants obtained from the land office in the year 1793, the relator had surveyed for him, by the surveyor of Baltimore County, 300 acres of land, called Boreing's Habitation Rock, and returned a certificate thereof, and that afterwards, on the 24th of April, 1795, a patent issued to him for the same. That the land taken up, and paid for by him, called Boreing's Habitation Rock, is claimed by Singery under the false and forged certificate and patent thereon, as will fully appear by the plot before referred to; and that Singery has possession of the land, and holds it as being within the lines of Singery's Troutng Streams. But the relator expressly charges, that he has instituted an ejection in the General Court against Singery to recover the land, and obtained a verdict and judgment in his favor, from which decision Singery has appealed to the Court of Appeals (a); and he is apprehensive that the said impositions and forgery will be productive of endless controversies and disputes between him and Singery, unless it can be corrected by this Court. That by the plot returned to the land office, with the certificate on which the patent issued, it is obvious that Singery's Troutng Streams, (which included two old surveys, namely Petticoat's Loose and \* Merryman's Mountain and a very small piece of vacancy,) could not contain more than 178 acres, as mentioned in the **490** certificate, because by the plot it appears that Petticoat's Loose, and Merryman's Mountain, were almost contiguous and adjoining tracts, and there was only a small vacancy between them; but by extending the twelfth line of Singery's Troutng Streams to the surreptitious "beginning trees of Petticoat's Loose," as now contended for by Singery, there will be created a vacancy of 382 acres between the two tracts, which the relator contends is not the fact, but that it is an imposition in Singery. That at the time Singery's Troutng Streams was surveyed, there was a rule or law of the land office prohibiting the surveyors from expressing calls in any certificates of surveys made by them under any warrant from that office, and that the call in the certificate of Singery's Troutng Streams, is in direct violation of that rule, as will appear by recurring to the rules of the land office, and by the deposition of Calder, the surveyor, now filed. Prayer, that the certificate and patent of Singery's Troutng Streams may be vacated, or corrected so as to exclude the call, and restrict Singery to the courses and distances specified in the certificate, and for further relief, &c. The answer of Singery, the defendant, states that commissioners were appointed

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(a) *Vide* 4 H. & McH. 898.

by the Lord Proprietary to make sale of his reserved lands, or of parts thereof, and the defendant being in possession of two surveys within the reserves of Baltimore County, the one called Merryman's Mountain, and the other called Petticoat's Loose, purchased the same of the commissioners, and he believes the two parcels of land were reduced into one entire tract under the authority of Calder, but not by him, for the defendant states that his survey and certificate were made out by a deputy of Calder, who usually made the surveys in the reserves of Baltimore. That his object in the purchase and survey was to join his two tracts; and a survey he admits was made called Singery's Troutng Streams, and returned to the office, on which patent afterwards issued to the defendant. That he does not know, nor was he ever privy, to any fraud or deception in making the survey or certificate of that land; nor does he know, admit or believe, there was any. He admits the call in the certificate greatly increases the quantity of his land, but he states the call was essentially \* necessary to join his two tracts

**491** together, which was the object of his purchase, and if the surveyor mistook the length of line, or quantity of acres, it was not with the consent, knowledge or privity, of the defendant. He does not believe the certificate recorded in Calder's book to be a true copy of his certificate; and that Calder is grossly mistaken in two important facts, and those facts are misconceived and mistaken in the bill of complaint. That Calder never did make out or sign a certificate of Singery's Troutng Streams for the office, but that the same was made out, signed and returned, by the deputy, and is now in the office, and it was usual and customary for Calder's deputy so to do with his assent, as will appear by a great number of original certificates in the land office, made out at the very period when the defendant's was, and some of them on surveys made in the reserves. That the certificate returned to the office is the true and genuine certificate of Singery's Troutng Streams, which was made out for, and delivered to him as such, by Calder in person, to whom the defendant carried it, and the same has a call to the beginning trees of Petticoat's Loose, which was a well known place, and intended to be run to and called for; and the defendant can prove, that on the original survey made, the beginning trees of Petticoat's Loose were actually run to, and he offered such evidence on the trial of the ejectment cause referred to by the bill of complaint, which testimony the General Court refused to admit. The defendant does not pretend to know what may have been the rules of the land office at that time as to the calls, but Calder is mistaken in his deposition filed, because there are many certificates in the office made out and signed by him, of surveys at that time of reserve lands similar to the defendant's, in which Calder hath inserted calls. The defendant denies all fraud, combination, &c. That the call in his certificate and patent were of such notoriety, and his possession of, and

the beginning trees of Petticoat's Loose were so well known to the neighborhood, and to the surveyors in the county, that younger surveys were made, which called for and run with the line and to the call mentioned in the defendant's patent, as is demonstrated by the location of the tract of land called Horatio's Lot, on the plot filed. That the defendant, actuated by the most honest principles, made a resurvey on his land in \* 1792, and included the whole of his lands, and returned a certificate to the office, and the excess 492 of the number of acres was called surplus; that he was willing to pay for it, and made his resurvey with that intent, but by reason of the Act of 1785, ch. 81, the treasurer could not receive such payment, and it was not until after this transaction that the relator, combining and leaguings with Calder, who to cover his own negligence and misconduct in office, combined with the relator to cheat the defendant out of his land, and recommended the relator to take up the surplus as vacancy, which Calder was to support, by throwing all blame on his deputy, although the records of the land office falsify the oath of Calder in two essential facts; first, they show that it was customary for his deputies to make out certificates and sign his name; and secondly, that he himself, in certificates made out and signed by him, did give calls. He admits the action of ejectment instituted in the General Court by the lessee of the relator, for recovery of part of the defendant's land, included in the relator's tract called Boreing's Habitation Rock, but the facts never came to issue; that the case was determined on a point of law, to which a bill of exceptions was taken, and the judgment of the Court was appealed from, and the appeal will go up to the Court of Appeals in June next. He does not believe the relator is entitled in any Court of law or equity to a vacation of the defendant's original grant, the same can only originate in a desire to ruin and oppress the defendant; because if the relator ultimately succeeds in the Court of Appeals, a decree to convey all the defendant's right and title to the relator, in fee, of all the land contained in his patent of Boreing's Habitation Rock, will be sufficient. He further states, that he claims the whole of the land included in his patent called Singery's Troutings Streams; that the call was an honest one; that the tracts of land called Merry-mad's Mountain and Petticoat's Loose, never did lay contiguous or close to each other, but always lay, were located and held, as by the table of courses thereof on the plot filed; that the survey was made by a deputy of Calder named James Hall, who made out the certificate, as was common with Calder's deputies in the reserves, and that Calder did not himself make the same out; and the defendant believes the mistake exists on Calder's books; that the entry was made therein from the deputy's field notes, \* and the call 493 omitted to be inserted; that the call did exist in the original and was actually *bona fide* run to at the time of the survey; and the

defendant ought not to lose his land from the fraud, negligence or mistake, of Calder and his deputies.

The testimony of a number of witnesses was taken under commissions and returned. The defendant afterwards by his petition, (referring to the proceedings herein set forth, and to the action of ejectment depending between the parties,) stated that the judgment of the General Court in that action had been reversed in the Court of Appeals, and the record returned to the General Court, with a *procedendo* directing a new trial. That since this cause has been set down for hearing in this Court, the action of ejectment remanded to the General Court for a new trial, has been tried, and a verdict rendered in favor of the defendant, (*ante* 455.) That on that trial, the General Court gave a direction to the jury, that if the certificate of Singery's Troutng Streams was forged, that the patent thereon issued was void, or an opinion to that effect. But on a full and fair trial before the jury, verdict was rendered in favor of the defendant, by which the fairness of the certificate, and validity of the patent was ascertained. That inasmuch as these facts have happened since this cause has been set down for hearing in this Court, he is apprehensive that he will not be able to avail himself thereof, without the order of this Court. Prayer for liberty to exhibit as proof the record of the proceedings in the ejectment, and that the same may be taken as part of the proceedings in this cause.

HANSON, C. (December 6, 1805.) The Chancellor has considered the petition of the defendant. It appears to him convenient to both parties in this cause to grant the prayer of the petition, instead of having proceedings, which would have the same effect as is proposed by the petition, and would be attended with delay and expense. It is therefore ordered, that the prayer be granted; and that the record of the proceedings in the ejectment, stated in the petition, be filed in this cause, and taken as part of the proceedings therein.

The record was accordingly filed; and the case was argued, and submitted to the Chancellor for his decision.

**494** \* KILTY, C. (July Term, 1806.) The object of the bill is, that the certificate and patent of Singery's Troutng Streams, therein mentioned to have been fraudulently obtained, may be vacated and annulled, or corrected in the manner stated.

It was filed on the 19th of November, 1799, at which time as the bill states, Boreing had obtained a verdict and judgment in his favor in an ejectment for the land, from which Singery had appealed.

On the 13th of November, 1805, a petition was presented to the late Chancellor by Singery, stating the verdict and appeal, and also stating that the judgment had been reversed, and that on the suit being again tried, a verdict was rendered in his favor, and praying that the record of the proceeding in the ejectment might be taken as



part of the proceedings in this cause; which prayer was granted, as appears by the order of December 6th, 1805.

The proceedings have accordingly been filed, and from their connexion with the other testimony, the Chancellor has felt considerable difficulty in forming his opinion.

He was at first persuaded that this verdict was either conclusive as to the question of fraud, or of such weight as to prevent his drawing a different conclusion from the whole of the evidence. The authorities on this subject are not very clear. The case most in favor of this position, is *Underwood vs. Morduant*, 2 *Vernon*, 238, in which the Court declared, that the question was, whether an assignment was fraudulent or not; and that having been tried at law there was no room for equity to interfere; that if they should relieve the plaintiff, they must declare that not to be fraudulent in equity which was found to be so at law.

But on further consideration he has changed his opinion, on the following grounds: That the suit in this case referred to, having been an ejectment, the verdict is not final between the parties, but another ejectment may be brought. On such further suit the verdict may be given in evidence as the opinion of twelve men on the fact, but it cannot be conclusive, as that would be to defeat the object of the suit. And if in a Court of law the question of fraud may be again examined, it cannot be closed against a Court of equity, in which fraud is the great subject of relief.

It must be admitted also, that the record, which is thus made part of the proceedings, cannot have a greater effect in bar to this suit, than if it had been used as a plea.

\* A decree determining the rights of the parties might be pleaded to this bill, and so might a judgment of a Court of **495** law, but it must be a judgment which has finally determined the rights of the parties.

The Chancellor, considering himself thus empowered to inquire into the fraud alleged in the bill, is satisfied from the evidence, (notwithstanding the verdict showing the opinion of the jury to the contrary,) that the charge is established, and that the complainant is entitled to relief.

In addition to the particular object of the bill, as herein before stated, there is a prayer for general relief, and Boreing, at whose relation the bill is filed, is satisfied that Singery's patent should remain valid for such part of the land as is not included in the patent for Boreing's Habitation Rock; and it appears that for so much the public has been paid by Singery. It is therefore considered proper in this case, and conformable to the practice in similar cases, to decree a conveyance from Singery, of the part claimed by Boreing, instead of vacating the patent to Singery, as prayed. Decreed that Singery do, by a good and sufficient deed, &c. give, grant, &c. to Boreing, and his heirs, all that part of the land in Baltimore County, now held by

him under his patent for a tract of land called Singery's Troutng Streams, which is comprehended in the lines of a tract of land called Boreing's Habitation Rock, which was granted by this State to Ezekiel Boreing on the 24th of April, 1795, beginning, &c. with all and singular the appurtenances, &c. and all the right, title, and interest of Singery, therein and thereto. And upon the due execution and acknowledgment and recording of the deed, Boreing shall be entitled to hold the same free, clear and discharged, from all claim of the defendant. And that the defendant pay to the complainant the costs of all this suit, &c. From this decree the defendant appealed to this Court.

The cause was argued before CHASE, Ch. J. GANTT and EARLE, JJ.

*Shaaff*, and *Johnson* (Attorney-General,) for the appellant, cited *Underwood vs. Morduant*, 2 Vern. 238; *Bright vs. Eynon*, 1 Burr. 376; *Fermor's Case*, 3 Coke, 78; 1 Fonbl. 13, (notes;) *Moses vs. Macferlan*, 2 Burr. 1009; and *Negro James vs. Gaither*, (ante 176.)

\* *Martin and T. Buchanan*, for the appellee cited **496** *borough vs. Gifford*, 2 P. Wms. 425; *Kent vs. Bridgman*, Pre. in Chan. 233; *Faulcomberg vs. Pierce*, Ambl. 210; *State vs. Mabbott*, 2 Ves. 552; *Mathews vs. Warner*, 4 Ves. 206; *The Proprietary vs. Jennings*, 1 H. & McH. 92; *Russell & Lux vs. Falls*, 3 H. & McH. 457; *State vs. Reed*, 4 H. & McH. 6; and *Garretson vs. Cole*, 1 H. & J. 370.

CHASE, Ch. J. delivered the opinion of the Court. In the ejectment brought by the lessee of Boreing, for Boreing's Habitation Rock, against Singery, the question in issue between the parties, on the different locations on the plots, was, who was entitled to that part of Boreing's Habitation Rock, which was covered by or included within Singery's Troutng Streams? This question might have been decided on the different certificates and grants of the parties, and such evidence as might have ascertained what was the true location of the respective tracts claimed by the litigating parties. It appears by the record and testimony in this case, that the certificate and grant of Singery's Troutng Streams are older than the certificate and grant of Boreing's Habitation Rock, and would have a preference, so far as the conflicting grants interfered.

To repel the defendant's defence, and to impeach his title, the plaintiff offered to prove, that the certificate of Singery's Troutng Streams was forged, and the evidence for that purpose was admitted by the Court; and such evidence could not have been deemed admissible by the Court, only on the ground that if it was proved to be forged, the grant obtained on it was fraudulent, and could not have any operation in law to pass the land to the defendant. That decision must rest on the principle, that what commences in iniquity

must transmit its impure or deleterious quality to the grant which was intended to perfect or complete the title of the party, and will invalidate it, unless the Proprietary was apprised of the malpractice before the issuing the grant. The evidence in a Court of law, and in a Court of Equity, to impeach them, is the same, parol evidence being admissible in both—the effect and final result is the same. In Chancery the patent is vacated, and the judgment and decree are declared to be nullities and the party is enjoined from proceeding further on them. \* In a Court of law, the judgment is that they cannot and do not transfer or pass any right or interest. **497**

In a Court of law, the mode of examination is preferable, because the evidence is better sifted, and more critically inquired into, and the credit of the witnesses is better tested. Where frauds are clearly established, the Courts of law and a Court of Chancery have concurrent jurisdiction. In some cases it may be necessary to resort to a Court of Chancery to compel a discovery of facts and circumstances, which are confined to the knowledge of the parties, in order to prove a fraud; which, it is believed, is the only reason why the applications are more frequent, in cases of fraud, to the Court of Chancery, than to a Court of law. If the evidence was improperly admitted because the operation of a grant cannot be questioned in a Court of law for fraud in obtaining it, then the verdict of the jury, finding for the defendant, cannot conclude the plaintiff as to the fact whether the certificate was forged or not. But what principle is it which allows a Court of law to be competent to inquire into fraud and collusion in obtaining a judgment or decree, and to declare such judgment or decree inoperative to pass any right or interest, which does not extend to a patent? A judgment or decree must stand on as high authority as a patent. In this case the fact of forgery came before the Court and jury collaterally, and was not directly in question, the issue between the parties being, who had the right of possession to the land in controversy? and therefore the verdict cannot be received as evidence to prove that the certificate was not forged. It may very well be questioned, as the Court were not called on, and did not direct the jury if they found the certificate forged, that nothing passed by the patent; and as the jury might suppose, notwithstanding the certificate was forged, that the prior grant ought to prevail, and could not be affected by it, whether the verdict could conclude the plaintiff if the fact of forgery had been directly in issue.

Although on a bill in Chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet the Court of Chancery has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant or deed from whence the injury has arisen, or \* will make such decree as the circumstances of the case render necessary. **498**

The Court are of opinion, that the forgery of the certificate of Singery's Troutng Streams, and the fraud consequent thereon, have been fully established, and affirm the decree of the Court of Chancery, with costs to the appellee.

GANTT, J. dissented.

*Decree affirmed.*

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HUNTT & PARKS vs. GIST *et al.*

W. being seized of a tract of land called P. containing 275 acres, executed a bond of conveyance to J. conditioned that he would convey to him all his right, &c. "of, in and to, 120 acres of land called P. situate," &c. On a bill in Chancery for a specific performance, &c. *Held*,

That there being no designation of the 120 acres of land, nor any description whereby it could be identified and located, parol evidence is not admissible to show that it was intended by the parties that they were to be laid off at the southernmost part of the tract. That the bond is void for uncertainty, except on the principle of election, and that there was no evidence to prove that there was any election made by either of the parties anterior to the time of the execution of the deed from W. for part of the tract described by metes and bounds, to one of the defendants who was a fair and *bona fide* purchaser of the land conveyed to him, without notice that there was any designation of the 120 acres, and held that J. was entitled to 120 acres out of that part of the land not conveyed to the said defendant. (a)

APPEAL from a decree of the Court of Chancery. The bill filed by the appellees against the appellants, on the 16th of January, 1795, stated that William Parks, deceased, was seized and possessed of a tract of land in Baltimore County called Turkey Cock Alley, containing 50 acres, which by virtue of a special warrant, was on the 10th of July, 1754, resurveyed for him, and a certificate thereof returned into the land office, by which he caused to be added 102 acres of land supposed to be vacant, and consolidated the whole into one survey by the same name of Turkey Cock Alley. That Parks, neglecting to compound for the added vacancy within the time required, a proclamation warrant was thereupon granted to Edward Stevenson, and he, on the 22d of February, 1764, assigned the same to Parks, who by virtue of the warrant of proclamation and assignment, on the 28th of the same month, had resurveyed for him the added vacancy before mentioned, excluding seven acres thereof as being within the lines of elder surveys, and upon the resurvey caused to be added the quantity of 127 acres of vacant land, giving to the whole the name of Parks' Death Knot; and on the 5th of March, 1764, he obtained a patent on the certificate. That on the 14th of April, 1764, Parks executed and delivered to Joshua Cockey, de-

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(a) See *Hammond vs. Norris*, ante, 118, note (b); *Bladen vs. Wells*, 80 Md. 577; *Marshall vs. Haney*, 4 Md. 498.

ceased, a bond of conveyance for 120 acres of the land called Parks' Death Knot, by which bond it was, as the complainants believe, intended to secure to Cockey 120 acres of the vacancy added on the proclamation warrant, forming the southernmost parts of Parks' \* Death Knot. That before Parks obtained the assignment from Stevenson, (which was procured by Cockey,) or at the **499** time of such assignment, it was agreed between Parks and Cockey, that as Parks was unable to pay the caution money on the certificate to be returned in virtue of the assignment, Cockey should pay the same, and should have, for such payment, 120 acres of the land, to be secured by the certificate; in consequence whereof Cockey did pay the caution money, and thereupon patent issued, as before stated, to Parks, and the bond of conveyance was given in pursuance of the agreement. That Parks, in his life-time, although he never made any conveyance in pursuance of the bond, always acknowledged the right of Cockey, and always was ready and disposed to make the conveyance. That Parks died about 10 years ago intestate, leaving a son named William Parks, (one of the defendants,) of full age, his heir-at-law, who hath also at different times acknowledged the bond of conveyance, and the equitable right thereby created. That Cockey died some time in 1765, having first duly made his will, dated the 3d of December, 1764, whereby, among other things, he devised as follows: "Item. I give and bequeath to my eldest daughter Penelope Deye Cockey, 100 acres of land, being part of a tract of land known by the name of Parks' Death Knot, lying in the county aforesaid, which said parcel of land I give and devise unto her, and her heirs forever;" and of the said will constituted and appointed Thomas Cockey Deye sole executor. That Joshua Cockey left the complainant, Thomas Deye Cockey, his eldest son and heir-at-law, then an infant under the age of 21 years, and also the other children mentioned in the will. And that after the death of Joshua Cockey, his executor proved his will, and took out letters thereon, and, among other papers of Joshua Cockey, came to the possession of the bond of conveyance, and kept the same in his possession until the 4th of February, 1793, when he delivered it to the complainant, T. D. Cockey, as heir-at-law of J. Cockey. That Penelope Deye Cockey, afterwards intermarried with Thomas Gist, and she and her husband are two of the complainants in this cause. That Thomas Deye Cockey, one of the complainants, believing that the whole of the land intended to be secured by the bond of conveyance was meant to be devised to Penelope Deye Cockey, now Gist, by the will of Joshua Cockey, although \* only 100 acres are therein mentioned, did on the 17th of January, 1794, execute **500** a bond of conveyance, by which he bound himself to convey to her, in fee, all his right, title and interest, in the said land. That on the 19th of December, 1789, Parks, the younger, sold and conveyed part of Parks' Death Knot to Job Hunt, (one of the defendants;) and

that the land included, within the metes and bounds in that conveyance, is the southeast part of the land intended to be secured by the bond of conveyance before mentioned; and that Huntth had full knowledge of the bond, and had seen and read it, and well knew the premises at the time of his purchase, and before the making of the conveyance to him. That on the 13th of March, 1790, Parks, for the purpose of indemnifying and securing Huntth from all claims against the land so conveyed to him, did by another deed convey to him in fee all the residue of Parks' Death Knot, with proviso that if Parks should indemnify him from all claims against the land first conveyed to Huntth, the last mentioned conveyance should be void. That on the 10th of April, 1790, Parks, among other lands, conveyed to Huntth in fee all the tract called Turkey Cock Alley, with an exception as to a small part thereof, and also all the tract called Parks' Death Knot, excepting 31 acres thereof before conveyed to Huntth by the deed first herein referred to, and also excepting 120 acres of that tract, for which the bond of conveyance was given. That Parks, the elder, at sundry times, and down to the time of his death, applied to Deye, as executor of Cockey, to pay various assessments and charges on the 120 acres of land in the bond of conveyance mentioned, alleging, that as the land belonged to the estate of Cockey, all charges thereon ought to be paid out of his estate; in consequence of which applications Deye, as executor of Cockey, paid all such assessments and charges as were exhibited to him by Parks, who acknowledged the bond of conveyance, and that the consideration of the bond had been duly paid, and frequently offered to Deye to make him a conveyance of the land mentioned in the bond, as executor of Cockey, &c. That in the deed of conveyance last before referred to, Parks, the younger, and Huntth, (the defendants,) have both acknowledged the bond of conveyance, and an existing right under and in virtue of the same. That Huntth, in consequence of the conveyances to him from Parks,

**501** hath \* entered into and taken possession of the land therein mentioned. Prayer, that the defendants may be compelled to convey to the complainant, Penelope Deye Gist, in fee simple or to such of the complainants as may be thereto entitled, the 120 acres of land by the bond of conveyance meant and intended to be conveyed; and for other and further relief, &c.

Exhibit, (among others.)—The bond of conveyance from Parks and wife, to Joshua Cockey, dated the 14th of April, 1764, in the penal sum of £500, and conditioned as follows: The condition of this obligation is such, that if the above bounden William Parks, and Eleanor his wife, and each and every of them, and each and every of their heirs, executors, administrators and assigns, do and shall, upon demand and at the request, cost and charges, of the above named Joshua Cockey, his heirs or assigns, well and truly convey and assure, or cause to be conveyed and assured unto him, the said Joshua Cockey, his heirs and assigns, for ever, all the estate, right,

title and interest, of them the said William Parks, and Eleanor, his wife, and their heirs, and each and every of them, of, in and to, one hundred and twenty acres of land called Parks' Death Knot, situate, lying and being, in the County of Baltimore aforesaid, with the appurtenances thereunto belonging or appertaining, now in the possession or occupation of them the said William Parks, and Eleanor his wife, by such sufficient conveyances and assurances in the law, as by the said Joshua Cockey, his heirs or assigns, or his or their counsel learned in the law, shall advise and require; then the said obligation to be void and of none effect, or else to be and remain in full force and virtue in law."

The answers of the defendants stated, among other things which it is not material to notice, that they were totally ignorant for what consideration the land was to be conveyed, or what part of the land was intended to be conveyed; and they did not know or admit that the southernmost or south-easternmost parts was intended to be conveyed under the bond of conveyance. That Cockey, or any person claiming under him, never was in possession of any part of the land—nor did they ever hear at any time that Cockey was, by virtue of the contract, entitled to the southernmost or south-easternmost part. That Penelope, one of \* the complainants, came of full age 15 years past or more, and T. D. Cockey, (one other **502** of the complainants,) not less than 11 or 12 years past. That Parks, the grantor, and after his death, Parks, the son, were willing to comply with the bond of conveyance, and convey to Cockey, or to whomsoever was entitled under the bond, whatever land they were thereby entitled to have conveyed to them; but no person chose to come forward and receive a conveyance, or ascertain what part of the land he, she or they, were entitled to under the said contract. That on the 23d of October, 1789, Parks, being desirous of selling the residue of the land to extricate himself from difficulties under which he then suffered, did advertise publicly in the *Maryland Journal* and *Baltimore Advertiser*, requesting any person who was entitled to the benefit of the bond of conveyance to appear, prefer their claim, and receive a conveyance for the land they might be entitled to thereby. That T. D. Cockey and Penelope Deye Gist, were then both of full age, and that neither of them did apply to receive the conveyance, although thus called upon. That Parks was at that time under execution, and had no method of freeing himself therefrom but by a sale of some part of his lands. That he applied to Hunt, and proposed to sell him a part of his lands in order to raise money to free himself from the execution; and in consequence Hunt purchased from Parks the lands mentioned in the deed of the 19th of December, 1789, which was then supposed to contain 31 acres, for which Hunt paid six dollars per acre. That the land being found to contain eight and a quarter acres more, he paid for the surplus on the 15th of March, 1791. That Hunt was in-

duced to purchase the particular part of the land described in that deed, because it lay adjoining to lands which he then owned; and the greatest part thereof actually ran in, and lay between, two tracts of land owned by him. That Hunt had seen and knew of the bond of conveyance which had been so executed by Parks, the elder, to J. Cockey, and had advised with counsel as to the effect thereof, and it was by the advice of counsel that he made his purchase. That on the 10th of April, 1790, Parks executed a deed to Hunt for the lands therein mentioned, which was intended to secure to Hunt the payment of £88 3 6, then due to him, with interest.

**503** Hunt admitted, that on the 13th of March, 1790, Parks \* executed in due form of law another conveyance to him, the object and intention of which was to secure and guarantee to him the lands first sold to him; that after deducting the lands so conveyed by Parks to Hunt by the first conveyance, there remained a greater quantity of Parks' Death Knot, than was contracted by the bond of conveyance to be conveyed to Cockey. That they were instructed, that after the length of time which had elapsed since the execution of the bond of conveyance, without the complainants either possessing the land so alleged to have been contracted to be sold to their father, or claiming an execution of the contract, the complainants were not, nor was either of them, entitled to the aid of this Court specifically to execute the contract to the prejudice of Hunt, who is a purchaser for a valuable and *bona fide* consideration; and they claimed the benefit of the laches of the complainants, and of those under whom they claimed, and of the length of time, as fully and to all intents and purposes as if they had pleaded the same, and relied thereon for their pleas.

Testimony was taken and returned under a commission; and the lands were directed to be surveyed, and a plot thereof was returned.

KILTY, C. (July Term, 1806.) The Chancellor is of opinion from the evidence, that the bond of conveyance was intended to secure 120 acres of the vacancy added on the proclamation warrant taken out by Edward Stevenson, and assigned to William Parks, on which a survey was made the 28th of February, 1764, as appears by the certificate returned to the land office, being in the whole 127 acres. And also that it was intended to exclude the part added as the third vacancy, although the third vacancy is returned as containing only six acres. The first and second vacancy added are returned as containing, the one six, and the other 115 acres, making together 121 acres instead of 120, which it may be inferred from the evidence they were supposed to contain by the parties to the bond. The complainant, Penelope Deye Gist, is therefore entitled under the will, and bond of conveyance from Thomas Deye Cockey, which are not contested, to a conveyance for that part of Parks' Death Knot, which is claimed by the bill. The part of Parks' Death Knot which was



conveyed by the defendant William Parks, to the other defendant, \* Job Hunt, by the deed of the 19th of December, 1789, was stated therein to contain 31 acres, and by the mortgage of 504 the 13th of March, 1790, the residue is also conveyed to him, thereby vesting in him the legal title in the whole. And inasmuch as Parks has an equitable title to the residue, and by joining in the conveyance for the part conveyed by him to Hunt will not be bound to make a general warranty, or be liable to any risk or loss thereby, it is considered that a joint deed will be the most proper to vest the legal title in the complainant, Penelope Deye Gist, according to the bonds—Decreed, that the defendants shall, by a good deed to be executed by them, and acknowledged and recorded according to law, give, grant, &c. to the complainant, Penelope Deye Gist, and her heirs, 120 acres of land called Parks' Death Knot, situate, &c. the said 120 acres being part of a tract of land resurveyed for William Parks, deceased, father of William Parks, one of the defendants, on the assignment of Edward Stevenson, on or about the 28th of February, 1764, and patented to William Parks, deceased, on or about the 15th of March, 1764; to be laid off as follows, to wit: To include the whole of the first vacancy described in the certificate of the resurvey, to begin at, &c. containing six acres; to include also the second vacancy described in the certificate of the resurvey, to begin, &c. containing 115 acres, except one acre thereof, which one acre is to be taken off by extending reversely the 16th line of the resurvey on Turkey Cock Alley, on which the proclamation warrant was taken out. And all the estate, &c. of the defendants therein, and which was in William Parks, deceased, and all and singular the hereditaments and appurtenances to the same belonging, or in any manner appertaining. And upon the due execution, acknowledgment, and recording of the deed, the complainant, Penelope Deye Gist, her heirs and assigns, shall be entitled to hold the said land free, clear and discharged, from all claim of the defendants, or either of them; the said conveyance being in satisfaction of the bonds in the proceedings mentioned. Decreed also, that the defendants, and each of them, deliver up to the complainants, Thomas Gist, and Penelope Deye Gist his wife, the quiet and peaceable possession of the land hereby decreed to be conveyed; and that they pay to the complainants the costs \* of 505 this suit, &c. From this decree the defendants appealed to this Court.

The cause was argued before CHASE, Ch. J. GANTT and EARLE, JJ.

*Martin and Brice*, for the appellants, referred to *Co. Litt.* 145; 2 *Bac. Ab. tit. Election*, (B) 443; *Taylor vs. Stebbert*, 2 *Ves. Jr.* 437; *Moor.* 72, *Case* 197; *Hayward's Case*, 2 *Coke*, 36.

*Johnson*, (Attorney-General,) and *Winder*, for the appellees.

CHASE, Ch. J. delivered the opinion of the Court. The Court are of opinion, that in the bond of conveyance from William Parks, Senior, to Joshua Cockey, there being no designation of the 120 acres of land to be conveyed to Cockey, nor any description whereby the same could be identified and located, parol evidence is not admissible to show that it was intended by the parties that the 120 acres were to be laid off at the southernmost part of the tract of land called Parks' Death Knot. That the bond is void for uncertainty, except on the principle of election; and there is no evidence to prove that there was any election made by either of the parties, or their representatives, anterior to the time of the execution of the deed from William Parks, Junior, to Job Hunt, on the 19th of December, 1789. That Hunt was a fair and *bona fide* purchaser of the land conveyed to him by that deed, without notice that there was any designation of the 120 acres to be conveyed in virtue of the bond of conveyance to Cockey, or his heirs. That Penelope Deye Gist is entitled to a conveyance of 120 acres of land, part of the 222 acres of vacancy secured by the proclamation warrant taken out by Edward Stevenson, and assigned to Parks, the elder. Decreed, that the decree of the Court of Chancery be reversed, with costs to the appellants, and that the appellants, by a sufficient deed or deeds, convey to Penelope Deye Gist, one of appellees, and her heirs, 120 acres of the vacancy of 222 acres, to be laid off together in one body, if practicable, if not, so as to be most convenient, exclusive of the land conveyed to Hunt by Parks, the younger, by the deed of the 19th of December, 1789, \* and exclusive of the land conveyed by Parks to Arabella Worrell. That the Court of Chancery make all necessary orders, and take measures for having this decree carried into full and complete effect. *Decree reversed, &c.*

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THOMAS vs. THOMAS.

In an action of trespass *q. c. f.* the Court refused to direct the jury, that if the plaintiff, 20 years before bringing the action, ran his land in the presence of the defendant to a point, marked on the plots in the cause, as a boundary between his land and the land of the defendant, and the several lines from that point to certain other points, also marked on the plots, as divisional lines between them; and if the defendant has at no time committed any trespass over said divisional lines, in such case he is not a trespasser, and not liable to the action, unless he was previously warned or forbidden to come to said lines.

APPEAL from Frederick County Court. Trespass for breaking and entering the close of the plaintiff, (now appellee,) called The Resurvey on Hazzard. The defendant, (the appellant,) pleaded the general issue. A warrant of resurvey was ordered and issued, and

the lands in dispute were located and plots returned. The plaintiff at the trial in August, 1806, offered in evidence the patent of The Resurvey on Hazzard, granted to Notley Thomas, on the 14th of February, 1754; that the patentee entered and died seized, and that the plaintiff is his heir at law, and entered, &c. He further offered in evidence the plots and explanations, and the patents for the several tracts of land located thereon by him, and that the same are truly located by him on the plots. He also offered evidence, that the defendant had cut down, cleared and cultivated, part of the land within said locations; that the plaintiff in 1800, before this suit was brought, forewarned a person who was working under the direction of the defendant within said locations, not to cut on his land, and which person, having given the information to the defendant, was directed by him to cease cutting there. He also offered evidence, that he had at two different times told different persons that he expected one day to get the land now in controversy, but the defendant was not present at either of those conversations, and did not appear ever to have heard of this claim. The defendant then read in evidence the patent of a tract of land called Moreland, granted to him on the 28th of June, 1784. He also gave in evidence the plots and explanations, with the several locations by him made thereon, and offered to prove that such locations were truly made. He also read in evidence a record, with the plots and explanations belonging thereto, of an action of trespass instituted in Frederick County Court by the plaintiff, against him the defendant, for breaking and entering the close of \* the plaintiff called The Resurvey on Hazzard, to which the defendant appeared and pleaded the general issue, **507** and a warrant of resurvey issued, and the lands in dispute were located on plots made and returned in that action. At the trial in that suit, the jury gave their verdict that the defendant was not guilty of the trespass complained of, and the plaintiff was non-suited. He also offered evidence, that the plaintiff and defendant in that action, and in the present action, are the same persons, and that the tracts of land, so far as in that record located, are the same as located in the present suit. That the pretensions and locations of the plaintiff on the plots in that record, of the land called The Resurvey on Hobson's Choice, from the end of the 41st line thereof to the end of the 44th line, correspond with the location as made by the defendant on the plots in this cause. He also offered evidence, that the plaintiff in 1782 acted as surveyor to run the division lines between the plaintiff and defendant, and that the lines were run, and an apple tree was marked at the end of the 41st line of The Resurvey on Hobson's Choice, in the presence of the plaintiff and defendant, as a corner between them. That from the apple tree so marked, the plaintiff run, as divisional lines between himself and the plaintiff, the lines located by him on the plots; and that the defendant has ever since that running been cutting and clearing the

land on the west side of the said divisional lines. Other evidence was given by the defendant, which it is unnecessary to notice, it having no relation to the point decided by the Court. The defendant then prayed the opinion of the Court, and their direction to the jury, that if from the evidence they find that the plaintiff, twenty years before the institution of this suit, run his land in presence of the defendant to the aforesaid apple tree, as a boundary between his lands and the lands of the defendant, and the several lines located by him as divisional lines between them; and if the defendant has at no time committed any trespass over said divisional lines, that in such case the defendant is not a trespasser, and not liable to this suit, unless he was previously warned or forbid to come to said lines. But the County Court, [BUCHANAN, Ch. J. CLAGETT and SHRIVER, A. J.] refused to give the direction as prayed. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

**508** \* The cause was argued before CHASE, Ch. J. NICHOLSON, GANTT, and EARLE, JJ. by

Harper, for appellant; and Shaaff, for appellee.

*Judgment affirmed.*

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BERRY, use of BURGESS' Adm'r vs. NICHOLLS.

A judgment having been obtained by B. against E. and C. his surety, a *fi. fa.* issued thereon against E. who survived C. and was laid on E's lands. The administrator of C. paid the amount of the judgment to B. who directed the judgment to be entered for the use of the administrator of C. A *venditioni exponas*, issued for the use of the administrator of C. for a sale of the lands, was returned unsold, and was, on motion of the defendant, quashed. (a)

VENDITIONI EXPONAS. A judgment was rendered in the late General Court at May Term, 1791, in favor of Z. Berry against E. Nicholls and C. Burgess, on which writs of execution regularly issued, but were not executed, until the 14th of July, 1806, when a writ of *feri facias* was issued, returnable to this Court, against Nicholls as survivor of Burgess, whose death was suggested, and was returned by the sheriff, "laid as pr. schedule, not sold, &c." The schedule described the property as follow: viz. "one house and lot in the town of Upper Marlborough, in the possession of John Hodges of Thomas; and one house and lot in the Town of Upper Marlborough, occupied by Philip T. Baker, Esquire." The plaintiff gave directions in writing to the clerk of this Court, dated the 19th of August, 1809, to have the judgment he had obtained against E. Nicholls, and

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(a) See *Norwood vs. Norwood*, ante, 208, note.

C. Burgess as security, entered for the use of Dennis M. Burgess, adm'r of C. Burgess, the money having been paid to him by said Burgess. On the 10th of November, 1809, the present writ of *venditioni exponas* issued for a sale of the above property, and was endorsed for the use of Dennis M. Burgess, administrator of Charles Burgess, and was returned by the sheriff, that the property remained unsold, &c.

Motion on the part of the defendant to quash the writ of *venditioni exponas*, for the following reasons: 1. Because, in the description of the property, taken under the *fieri facias*, there was not such certainty as the law requires. 2. Because the judgment, whereon the execution issued, was obtained against the defendant and C. Burgess, and by the endorsement on the execution, and the note of the plaintiff to the clerk, filed in Court, it appeared, that before issuing the *fieri facias* the judgment was satisfied, and the execution was issued for the use of \* the administrator of one of the original defendants against the other. 509

The motion was argued before CHASE, Ch. J. NICHOLSON, GANTT, and EARLE, JJ. by

*Magruder*, for the motion; and *Clagett*, *contra*.

THE COURT sustained the motion, and

*Venditioni Exponas quashed.*



# INDEX TO 2 H. & J.

*References are to top pages.*

## ABATEMENT.

An appeal or writ of error standing under rule argument does not abate by the death of either party. *Lynch vs. Colegate*, 27.

See EJECTMENT, 6.

EQUITY, 13.

EXECUTORS AND ADMINISTRATORS, 5.

## ACKNOWLEDGMENT OF DEEDS.

See DEEDS.

## ACTION.

When A. and B. by an agreement under seal agreed to enter into a copartnership for the period of ten years from the time when a mill was to be completed of which B. was to have the management, and A. and B. were to share equally the profits of the partnership, and the mill was completed on June 21st, 1798, and B. was dispossessed thereof by A. on January 31st, 1799, who from that time withheld from B. any share in the profits; *Held*:

That at the time of bringing the action; the plaintiff had a cause of action, being deprived of the benefits under the contract.

That the covenant on the part of the defendant, that the plaintiff should receive one-half of the profits of the mill, is an independent covenant; and that it was not incumbent on the plaintiff, to entitle himself to a recovery, to prove a compliance with or fulfilment of every stipulation in the covenant on his part to be performed.

That it was not necessary for the plaintiff, in order to support his action, to prove that he took up his residence at the mill, and superintended the same as miller, and devoted his time and attention to the mill, in such manner as is usual for men under wages to do particular work; that he kept a regular set of books, in which were contained all the transactions of the copartnership, and that he effected a settlement of the partnership accounts at the end of the year 1798, or that he was prevented from doing so by the defendant. That it was only necessary for the plaintiff to prove that he did enter upon the management and superintendence of the mill according to the covenant, and did work and manage the same.

That for withholding from the plaintiff the one-half of the profits of the mill, he could only recover therefor from the time when such withholding of the profits first commenced down to the time when the action was brought.

ACTION.—*Continued.*

That the plaintiff might recover damages for one-half of the net profits of the mill, down to the time of bringing the action only; and damages for the ejecting and turning him out of the possession of the mill, and for all advantages and benefits which might attend or result from the possession thereof, during the unexpired term of ten years, not comprehended within the net profits of the mill; and that an action or actions may be brought by the plaintiff against the defendant, for one-half of the net profits which might have been made, or may be made, from working the mill under the contract, from the 11th of February, 1799, during the continuance of the partnership under the same. That this being an action founded on contract, the plaintiff had only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him, (exclusive of his part of the profits of the mill,) according to the whole of the circumstances existing in the case, without reference to the force, if any, with which the plaintiff was dispossessed. *Morrison vs. Galloway*, 387.

See ASSUMPSIT, 3.

CONTRACT, 2.

EVIDENCE, 2, 24.

## ADVERSARY POSSESSION.

See EJECTMENT.

## APPEAL AND ERROR.

1. The Appellate Court cannot travel out of the record, but will make every necessary intendment in support of the judgment of the inferior Court. *M'Mechen vs. The Mayor, &c.* 35.
2. *Procedendo* awarded where the Court of Appeals concurred with the Court below in the opinion expressed in the bill of exceptions, but reversed the judgment, because of a defective count in the declaration. *Grant vs. Ridsdale*, 160.
3. A paper certified in a record transmitted on appeal, purporting to be a bill of exceptions taken at the trial, was held not to be a bill of exceptions in the case, it not appearing that the seals of the Judges of the Court below had been affixed to it. *Davis vs. Wilson*, 294.
4. The Court of Appeals having reversed a judgment of the Court below, on the form of proceeding, there being a material variance between the writ and the declaration refused to remit the record with a *procedendo*. *Ibid.*
5. The Court of Appeals, having concurred in the opinion expressed by the County Court in the bill of exceptions, but reversed the judgment on the form of proceedings, awarded a *procedendo*. *Smith vs. Gorton*, 315.
6. As a matter of practice, the evidence offered to the jury on which the opinion of the Court is prayed, ought to be stated in the bill of exceptions. The Court of Appeals, however, will retain a bill of exceptions where the Court below was called on and did give a direction to the jury, although no facts are stated therein. *Barnes vs. Blackiston*, 323.

See ABATEMENT.

COSTS, 1.



APPEAL AND ERROR.—*Continued.*

See DOWER, 1.

EXECUTION, 1.

PLEADING, 2.

## ARREST OF JUDGMENT.

See JUDGMENT.

## ASSIGNMENT.

See EQUITY, 6, 11.

MORTGAGE, 1.

## ASSUMPSIT.

1. In *assumpsit* for one year's services as an overseer, and a *quantum meruit* for the same services—*Held*, that if there was a special agreement between the plaintiff and defendant for the plaintiff's services as an overseer, the plaintiff could not recover upon his declaration. *Cushman vs. Sim*, 301.
2. The amount expressed in a note, purporting to be a genuine bank note, but which was proved to be forged, may be recovered in an action of *assumpsit* by the holder of the note from the person of whom he received it, although at the time of its receipt, neither party knew it not to be genuine, and the defendant did not warrant it to be genuine, or endorse it. *Mudd vs. Reeves*, 316.
3. B. sold and delivered to H. a quantity of sugar, under a parol agreement with R. that R. would pay for the sugar if H. did not. R. paid B. for the sugar; and an action of *assumpsit* was brought in the name of B. for the use of R.—*Held*, that it could not be sustained. *Barnes vs. Blackiston*, 323.

See BILLS OF EXCHANGE.

EVIDENCE, 10.

## ATTACHMENT.

The plaintiff in a judgment of condemnation on an attachment on judgment, where there was no *fiery facias* and sale of the land condemned, does not acquire a legal estate in the land by virtue of the judgment, attachment and condemnation. *Owings vs. Norwood*, 82.

See EXECUTORS AND ADMINISTRATORS, 3.

## ATTORNEY.

See BOND, 1.

EVIDENCE, 16, 23.

## AUCTION AND AUCTIONEER.

A person who entrusted an auctioneer with the sale of goods, and has a claim against him for money arising on the sale, has a right to apply for and direct a suit on the auctioneer's bond for the recovery of his claim. *M'Mechen vs. The Mayor, &c.* 35.

See EVIDENCE, 19.

PLEADING, 1.

## BILLS OF EXCHANGE.

In *assumpsit* on a foreign bill of exchange, the plaintiff is to recover as much money as will, at the time of the verdict, purchase a similar bill. *Bryden vs. Taylor*, 340.

See CONFLICT OF LAWS.

## BILLS OF REVIEW.

See EQUITY.

## BILLS OF SALE.

See SALE.

## BOND.

1. In an action on a bond given to the Mayor, &c. of Baltimore, in the name of the corporation for the use of A. where judgment was confessed, it should be considered that the suit was brought by the authority of the corporation, and a warrant of attorney need not be spread upon the record. *M'Mechen vs. Mayor, &c.* 35.
2. The Court will not so construe the recital in a bond as to defeat its operation and render it a nullity. *Ibid.*

See AUCTION AND AUCTIONEER.

EQUITY, 11, 17.

EVIDENCE, 11, 20, 25.

JUDGMENT, 1.

PLEADING, 1.

## CLERK OF COURT.

The clerk of a Court has no authority by law to certify a fact under seal; his duty is to grant exemplifications. *Hammond vs. Norris*, 111.

## CONFLICT OF LAWS.

The minutes of the proceedings of a notary public of a foreign country, are to be considered as records, under the courtesy of nations; and a copy under the hand and notarial seal of a notary is sufficient evidence of the protest of a foreign bill of exchange. *Bryden vs. Taylor*, 340.

See CONTRACT, 2.

DEBTOR AND CREDITOR, 3.

DISTRIBUTION, 1.

## CONSTITUTIONAL LAW.

A repealing ordinance cannot destroy or affect any right which was acquired by any person under the first ordinance before its repeal. *M'Mechen vs. The Mayor, &c.* 25.

## CONTRACT.

1. A parol contract between a father-in-law, and son-in-law, that the father-in-law would give a real estate to his grand-son, in consideration of the son-in-law paying one-half of the value of the land—Not enforced, though possession was held by the son-in-law, and a part of the purchase money paid. *Wingate vs. Dail*, 65.
2. If a contract is in writing it will itself show where it is to be executed; but if it does not appear on the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country. *De Sobry vs. De Laistre*, 164.

A contract made in a foreign country must be governed by the laws of that country, and no acknowledgment of the debt in another country can change the original nature of the debt. *Ibid.*

If an heir pure and simple, heir with benefit of inventory, or beneficiary heir, has not intermeddled with the estate or succession of a person dying in France, so as to prevent his recovery as such

CONTRACT.—*Continued.*

under the laws of France, he can recover in the Courts of this State on a contract made in France. *Ibid.*

It is a general principle, which admits of few exceptions, that in construing contracts made in a foreign country, the Courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired and the obligations created by it; and the remedy or mode of enforcing it is to be conformable to the laws of the country where the action is instituted. *Ibid.*

Where by the terms of a contract it is to be executed in another country, there the parties to it by common consent adopt the laws of that country as the rule of decision. *Ibid.*

Where a contract is *contra bonos mores*, as for the price of prostitution, such a contract, though legal in some countries would not be enforced in this State. *Ibid.*

3. N. H. for a valuable consideration, contracted with, and conveyed to J. S. by metes and bounds, 800 acres, part of a tract of land, "situate, lying and being, in the State of Kentucky, in the County of Bourbon, and on the main branch of Licking." A grant of the land described it as "lying and being in the County of Bourbon, on the main branch of Licking, in the State of Virginia." After the grant of the land, a new State, by the name of Kentucky, was formed from Virginia, and the County of Bourbon, became a part of Kentucky, which county was afterwards divided, and two new counties erected, called Clarke and Mason Counties, and the land now lies in those two counties. J. S. filed his bill in Chancery to have the contract vacated, and the consideration money repaid to him, &c. Decreed, that his bill be dismissed. *Hammond vs. Sapington*, 377.

See ACTION.

ASSUMPSIT, 1.

DEBTOR AND CREDITOR, 3.

EQUITY, 3, 14.

EVIDENCE, 10.

## COSTS.

1. A decree in favor of the complainant, but without costs, was on appeal by the defendant, reversed as to costs, and affirmed as to the residue; and decreed that the complainant should recover his costs in both Courts. *Haffner vs. Dickson*, 39; *Worthington vs. Bicknell*, 49.
2. Where a bill was filed in Chancery, to set aside and annul a decree before obtained by the defendant against the complainant, on the ground of fraud practiced by the defendant in obtaining that decree, there appearing to be no evidence of fraud, the bill was dismissed, but without costs. On an appeal to the Court of Appeals by the complainant, that Court affirmed so much of the decree as dismissed the bill, but reversed that part of it which directed that the dismissal should be without costs, and decreed that the appellant pay to the appellee his costs incurred in both Courts. *Hoffman vs. Baker*, 409.

See DOWER, 2.

## BILLS OF SALE.

See SALE.

## BOND.

1. In an action on a bond given to the Mayor, &c. of Baltimore, in the name of the corporation for the use of A. where judgment was confessed, it should be considered that the suit was brought by the authority of the corporation, and a warrant of attorney need not be spread upon the record. *M'Mechen vs. Mayor, &c.* 35.
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A repealing ordinance cannot destroy or affect any right which was acquired by any person under the first ordinance before its repeal. *M'Mechen vs. The Mayor, &c.* 25.

## CONTRACT.

1. A parol contract between a father-in-law, and son-in-law, that the father-in-law would give a real estate to his grand-son, in consideration of the son-in-law paying one-half of the value of the land—Not enforced, though possession was held by the son-in-law, and a part of the purchase money paid. *Wingate vs. Dail*, 65.
2. If a contract is in writing it will itself show where it is to be executed; but if it does not appear on the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country. *De Sobry vs. De Laistre*, 164.

A contract made in a foreign country must be governed by the laws of that country, and no acknowledgment of the debt in another country can change the original nature of the debt. *Ibid.*

If an heir pure and simple, heir with benefit of inventory, or beneficiary heir, has not intermeddled with the estate or succession of a person dying in France, so as to prevent his recovery as such

CONTRACT.—*Continued.*

under the laws of France, he can recover in the Courts of this State on a contract made in France. *Ibid.*

It is a general principle, which admits of few exceptions, that in construing contracts made in a foreign country, the Courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired and the obligations created by it; and the remedy or mode of enforcing it is to be conformable to the laws of the country where the action is instituted. *Ibid.*

Where by the terms of a contract it is to be executed in another country, there the parties to it by common consent adopt the laws of that country as the rule of decision. *Ibid.*

Where a contract is *contra bonos mores*, as for the price of prostitution, such a contract, though legal in some countries would not be enforced in this State. *Ibid.*

3. N. H. for a valuable consideration, contracted with, and conveyed to J. S. by metes and bounds, 800 acres, part of a tract of land, "situate, lying and being, in the State of Kentucky, in the County of Bourbon, and on the main branch of Licking." A grant of the land described it as "lying and being in the County of Bourbon, on the main branch of Licking, in the State of Virginia." After the grant of the land, a new State, by the name of Kentucky, was formed from Virginia, and the County of Bourbon, became a part of Kentucky, which county was afterwards divided, and two new counties erected, called Clarke and Mason Counties, and the land now lies in those two counties. J. S. filed his bill in Chancery to have the contract vacated, and the consideration money repaid to him, &c. Decreed, that his bill be dismissed. *Hammond vs. Sappington*, 377.

See ACTION.

ASSUMPSIT, 1.

DEBTOR AND CREDITOR, 3.

EQUITY, 3, 14.

EVIDENCE, 10.

## COSTS.

1. A decree in favor of the complainant, but without costs, was on appeal by the defendant, reversed as to costs, and affirmed as to the residue; and decreed that the complainant should recover his costs in both Courts. *Haffner vs. Dickson*, 39; *Worthington vs. Bicknell*, 49.
2. Where a bill was filed in Chancery, to set aside and annul a decree before obtained by the defendant against the complainant, on the ground of fraud practiced by the defendant in obtaining that decree, there appearing to be no evidence of fraud, the bill was dismissed, but without costs. On an appeal to the Court of Appeals by the complainant, that Court affirmed so much of the decree as dismissed the bill, but reversed that part of it which directed that the dismissal should be without costs, and decreed that the appellant pay to the appellee his costs incurred in both Courts. *Hoffman vs. Baker*, 409.

See DOWER, 2.

## CRIMINAL LAW.

1. A faro table set up in a house, not a dwelling-house, out-house, or place occupied by a tavern-keeper, retailer, &c. is not an offence under the Act of 1797, ch. 110, which directs that "no faro table," &c. "shall be set up, kept or maintained in any dwelling-house, out-house, or place occupied by any tavern-keeper, retailer," &c. *Baker vs. The State*, 5.
  2. An indictment containing two counts, one charging felony, and the other a misdemeanor, was held to be good. *Burk vs. State*, 365.
- After a prisoner has pleaded generally to an indictment, having two counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the other. *Ibid.*
- When nine jurors are sworn in a criminal case, and the rest of the original panel is exhausted by peremptory challenges, the Court can legally award an order for the summoning only three talesmen, and when eleven are sworn, to summon but one. *Ibid.*
- As to the manner of awarding a *venire* for summoning talesmen in criminal cases, capital. *Ibid.*
- As to the joinder of offences in criminal cases, and the joinder of causes of actions in civil cases. *Ibid.*

## DAMAGES.

See ACTION.

DOWER, 1, 2.

REFLEVIN, 1, 2.

## DEBTOR AND CREDITOR.

1. S. B. sold and transferred to E. S. 80 shares of bank stock, and took his notes therefor. Two days thereafter E. S. became insolvent, and transferred all his property to trustees, for the benefit of his creditors. The trustees sold the stock, and received the proceeds. On a bill filed by S. B. against E. S. and the trustees, claiming to be paid the notes out of the proceeds of the sale of the stock, in preference to the other creditors, it seems that he was not entitled to such preference. *Winchester vs. Brooke*, 1.

Where a preference is claimed by one of the creditors, it should appear by the proceedings, that there were other creditors whose claims are proved and allowed; also the amount of the estate and claims should appear, so as to show the proportion which the creditor, claiming the preference, is entitled to, in case he had no right to a preference. *Ibid.*

2. A devise of lands to a creditor does not extinguish a debt or claim which he has against the testator. *Partridge vs. Partridge*, 53.
3. Whatever fund in this State is answerable for debts, is answerable to all creditors alike according to the laws of the State. *De Sobry vs. De Laistre*, 164.

If the laws of this State give a preference to its citizens in the payment of the debts of a deceased, the defendant, if sued by a foreign creditor, must plead such preference. *Ibid.*

Unless the jury are satisfied according to the laws of France, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, then such co-heir is entitled to recover as a creditor whatever the jury may

DEBTOR AND CREDITOR.—*Continued.*

find due on a contract made in France, according to the laws of France. *Ibid.*

If a contract is made in this State between foreigners, and the debtor dies in a foreign country, the creditor may recover in the Courts of this State, according to the laws of this State. *Ibid.*

See DISTRIBUTION.

EQUITY, 6.

EXECUTORS AND ADMINISTRATORS, 1.

JUDGMENT, 2.

LAW AND FACT, 2.

## DEED.

1. Where a conveyance had been acknowledged by husband and wife, of the wife's land, and the certificate by the Justices stated, that the wife "being first privately examined by us separate and part from her husband, whether she did the same freely, voluntarily, and of her own accord, without being induced thereto by the ill-usage or threats of her husband, or fear of his displeasure, and having assured us she acknowledged the said deed freely and voluntarily, according to the Act of Assembly in such case lately made and provided, &c." was held not to pass the estate of the *feme covert* in the land to the grantee. *Greene vs. Muse*, 52.
  2. A memorandum made by a clerk in the record of a deed, stating that the date had been altered, &c. is not evidence, being an act done without authority, and will not invalidate the deed. *Owings vs. Norwood*, 82.
  3. The acknowledgment of a deed by a *feme covert* grantor, held to be defective, the word "fear" being omitted in the certificate of acknowledgment, and no word of similar import or meaning substituted in its place; but held to be cured by the Act of 1807, ch. 52, and,
 

A literal adherence to the form of such certificate is not essentially requisite; and the omission of words deemed essential can be supplied by the substitution of words equipollent, or of similar import and signification. *Hollingsworth vs. M'Donald*, 197.
  4. If a grantor of land, residing in a particular county, and having a temporary residence in another county, in neither of which counties does the land lie, acknowledges the deed in the county in which his temporary residence is, such deed is not good and valid in law to pass and transfer the grantor's interest in the land. *Hall vs. Gittings*, 326.
 

A temporary residence in any county of the State is not sufficient to enable a grantor, being a citizen of the State, to acknowledge a deed, during such temporary residence, for land lying in any other county of the State. *Ibid.*
- The words "legally authorized and assigned," in a certificate of the clerk of a County Court to a deed acknowledged before two Justices of the Peace of that county, is a substantial compliance with the directions, and within the meaning of the Act of November, 1766, ch. 14, and are words of the same import as "duly commissioned and sworn." *Ibid.*

DEED.—*Continued.*

To lay the foundation for proving an original deed lost, the evidence must be given to the Court. *Dorsey vs. Gassaway*, 345.

Proof being made of the loss of an original deed of mortgage of land and slaves, dated in 1763, the *inspeximus* was admitted to be read as legal evidence, although the deed was not recorded in the manner prescribed by law, so far as respected the slaves in dispute. *Ibid.*

Where a deed is lost, or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the deed. *Ibid.*

See CONTRACT, 3.

ESTATES TAIL, 2, 3.

EVIDENCE, 7, 19, 21.

HUSBAND AND WIFE.

## DEPOSITION.

1. In executing a commission issued to a foreign country, for the purpose of taking testimony, notice is not necessary, but time should be given, that the opposite party might exhibit cross-interrogatories. *Owings vs. Norwood*, 82.

2. As to the manner of striking commissioners and issuing commissions to a foreign country to take testimony. *De Sobry vs. De Laistre*, 164.

3. A permanent residence of a witness is not necessary for the purpose of taking his deposition under the Act of July, 1779, ch. 8, to perpetuate testimony; but a temporary or transient residence is sufficient. The fact of residence need not be placed on record. *Bryden vs. Taylor*, 340.

4. In executing a commission to take testimony, it is not necessary that the commissioners should appoint a clerk. *Beard vs. Heide*, 374.

5. Depositions returned under a commission issued to Pennsylvania, to take testimony in the cause, were not permitted by the General Court to be read in evidence, it not appearing, by the return of the commissioners, that they had given any notice, or that proper notice had been given. *Boreing vs. Singery*, 382.

Depositions similarly taken were not permitted to be read in evidence, although offered in evidence by the opposite party. *Ibid.*

See EVIDENCE, 10, 14, 22.

## DISTRIBUTION.

Personal property adheres to the person; and wherever the testator is domiciled at the time of his death, the property is to be distributed according to the laws of that country. *De Sobry vs. De Laistre*, 164.

No part of the personal estate of a testator dying in France, is subject to distribution among his co-heirs, but the surplus or residuum remaining after the payment of all his debts and legacies; and a debt due to one of the co-heirs is as much entitled to payment as a debt due to a stranger, unless there is proof that there is a law of France which extinguishes the right or claim of the co-heir creditor with benefit of inventory, if he does not renounce as co-heir. *Ibid.*

See DEBTOR AND CREDITOR, 3.

EXECUTORS AND ADMINISTRATORS, 1.



## DOWER.

1. In an action of dower it is not necessary to lay any damages in the declaration. *Keefer vs. Young*, 45.
2. In an action of dower a judgment was confessed for the demandant's dower claimed in the lands. A writ of *habere facias seisinam* issued, and the demandant's dower laid off. On the return of the writ, the County Court entered judgment for nominal damages, and costs. On appeal, the judgment for the damages and costs was reversed. *Hammond vs. Higgins*, 375.

See EVIDENCE, 2.

## EJECTMENT.

1. An equitable title in the defendant to lands, will not prevent a recovery against him in an action of ejectment brought by a person having the legal title, *Saunders et ux. vs. Simpson et ux.* 70.
2. Where the plaintiff with title, having possession by enclosure and cultivation of a part of a tract of land, claiming the whole, and the defendant, without title, having possession by enclosure of a part of the same tract, with the use (by cutting timber, &c.) of the other parts not enclosed, the plaintiff is bound by the Act of Limitations, as to that part of the land which is in the possession of the defendant by actual enclosure for more than 20 years next preceding the bringing his ejectment, but not as to the parts used by the defendant exterior to the enclosure. *Cheney vs. Ringgold*, 75.

When two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him, having the title, as in possession to the extent of his right. *Ibid.*

The Act of Limitations did not attach or run against the Lord Proprietary on any possession of vacant lands. *Ibid.*

3. If two persons are in possession of land, the one by right, and the other by wrong, it is the possession of him who is in by right. *Hall vs. Gittings*, 96.

The jury were directed on certain evidence of title and descent, that if true, then land which had been granted as escheat land was not escheatable, although for upwards of 100 years no person ever claimed the land under the original grantees. *Ibid.*

In ejectment the plaintiff must recover on the strength of his own title. The defendant may prevent his recovery, by showing a title in himself, or a clear subsisting title in a stranger. *Ibid.*

Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of the land, *i. e.* he who hath the *jus possessionis*. *Ibid.*

A clear subsisting title, outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties. *Ibid.*

No adversary possession of land can avail against the State. *Ibid.*

4. Where the plaintiff has made but one location on the plots of the beginning of the land for which the ejectment is brought, and that is counter-located, the jury cannot find a beginning for the plaintiff different from that located by him. *Hammond vs. Norris*, 111.

The plaintiff must make such locations of the land upon the plots as will suit his case. *Ibid.*

The jury cannot find a location of their own, but must find some one of the plaintiff's; if they find for him. *Ibid.*

EJECTMENT.—*Continued.*

If the beginning of a tract of land is lost or cannot be proved, then the beginning is to be found by reversing the lines of the tract from the first known and established boundary. *Ibid.*

5. A naked possession, (possession without right,) is adversary only to the extent of actual enclosures. *Hammond vs. Warfield*, 130.

Where the plaintiff's grant operated by relation to the date of the certificate, and overreached the defendant's elder grant for the same land, the entry of the grantee, under such elder grant, and the possession by him, and those claiming under him, was without right, and cannot bar the plaintiff's recovery, unless such possession was by actual enclosures for 20 years prior to the bringing the ejectment. *Ibid.*

6. The death of one of the lessors of the plaintiff, in an action of ejectment, may be suggested after the jury are sworn, and his heir, &c. need not appear, or be made a party. *Howard vs. Moale*, 218.

The Court directed the jury, that they might find the true location of D. F. for which the ejectment was brought, by a greater or less variation of the compass, as might appear to them proper from the evidence; provided that by such allowance of variation they did not enlarge or extend the plaintiff's pretensions beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V, to the head of Howard's Branch. *Ibid.*

The Court directed the jury, that the plaintiff could not recover any land which should be found to lie without and beyond a straight line to be drawn from the letter V, to the head of Howard's Branch. (he having located that line of his grant in that manner,) although those lands should lie within the lines of the tract of land for which the ejectment is brought, and also within the lines of the plaintiff's pretensions, as located on the plots. *Ibid.*

The Court refused to direct the jury, that if the plaintiff is estopped from showing the true location of the land, for which the ejectment is brought different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff. *Ibid.*

The jury, by their verdict, in an action of ejectment, having found the true location of the land, for which the ejectment was brought, to be from A to a, to 3, to four perches below big F, the head of Howard's Branch, and then to A; they also found for the plaintiff his pretensions, (not being to the extent of the said location,) to be from A to a, to V, to four perches below big F, the head of Howard's Branch, and then to A, and that the defendant was guilty of the trespass complained of within the said pretensions, and not guilty as to the residue of the trespass complained of in the residue of the land. *Held*, that there was no uncertainty in the verdict. *Ibid.*

7. Where the defendant in an action of ejectment, was in possession of 100 acres of land, by enclosures and cultivation, for 15 years.

**EJECTMENT.**—*Continued.*

and then enlarged his enclosures so as to include 150 acres, and he possessed the same, so enlarged, by enclosures for six years thereafter, claiming the same as his own—*Held*, that he had title to the 100 acres by adversary possession. *Hall vs. Gittings*, 826.

Where the expressions used in a grant of land describe it as "lying on the ridge of Gunpowder River, beginning at a bounded oak, being the westernmost bounds of a tract of land laid out for M. S. and running west 500 ps. to a bounded oak standing by the Great Falls, and running N. from the said oak," &c.—*Held*, that they do not operate to bind the first line to terminate at the Great Falls, although no evidence be given of the tree or place where it stood. *Ibid.*

The declarations by a deceased person, then seized of a particular tract of land not located on the plots in the cause, were offered in evidence by the defendant in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant.—*Held*, that the declarations were not admissible in evidence. *Ibid.*

In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, part of a tract of land called H. F. the jury, by their verdict, found the true location of that tract, and also the locations of other tracts of land for which the defendant took defence. They also found for the plaintiff all the land called H. F. as located by them, which lies clear of the other tracts, so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and J. S. from a particular point to another.—*Held*, that the verdict, and the judgment thereon rendered, were not uncertain, and were not for more land than the plaintiff claimed in his action. *Ibid.*

See DEED, 4.

EVIDENCE, 7, 13, 14, 15, 19.

GRANT, 2, 6.

MORTGAGE, 3.

STATUTES, I, 2.

**ELECTION.**

See EVIDENCE, 25.

**EQUITY.**

1. Whenever, on motion to dissolve an injunction, it appears from the answer that the complainant was entitled to an injunction at the time of obtaining it, the same shall continue until final hearing, or further order, unless the defendant admits everything alleged in the bill, on account of which the injunction was obtained. When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved, with a proviso that not more be levied than remains due after allowing everything claimed by the complainant. But when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is invariably continued until final hearing, or further order. *Lynch vs. Colegate*, 27.
- A. purchased land from B. and gave to B. his bond for the purchase money in which C. joined as surety. C. became surety under the impression, which he derived from B. that the purchase money

EQUITY.—*Continued.*

- would be realized from the sale of the wood growing on the land. The first instalment of the purchase money not being paid, B. obtained judgment on the bond against A. and C. and also obtained an injunction restraining A. from cutting any more wood on the land. On a bill by C. a perpetual injunction was granted restraining B. from enforcing his judgment against C. *Ibid.*
2. The specific performance of a bond for conveying a tract of land executed in 1764, decreed on a bill filed in 1792. *Haffner vs. Dickson*, 89.
  3. Where a person, having the equitable interest in land, is in possession, yet if such interest is not known, it will not prevail, if established, over the legal estate commencing subsequent to the equitable interest. *Dannison vs. Robinett*, 47.
  4. A. executed a mortgage to B. of real and personal property, to secure the payment of a sum in the then current money, and it was afterwards agreed between them, that the personal property should be released, on A's endorsing on the mortgage that it was a specie debt. A. afterwards conveyed his equity of redemption in the real estate to C. who, on the representations of B. of the sum due on the mortgage, and that it should not be released unless C. executed to him his bond for that sum, did accordingly execute such bond; on which a suit at law was brought, and judgment rendered thereon. On a bill in Chancery by C. an injunction was obtained to stay proceedings at law. The auditor was ordered to state the mortgage debt in continental money, reducing it into specie at 5 for 1, with interest, and credit the payments made; and on such statement it appeared that the debt was overpaid. Decreed, that the injunction be perpetual. *Worthington vs. Bicknell*, 49.
  5. A contract for the purchase of land, *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. *Hampson vs. Edelen*, 55.
  6. Where A. in consideration of a debt due from him to B. assigns to him (not under the Act of 1763, ch. 28, s. 9, 10,) the bond of C. and C. is or becomes insolvent—On a bill by B. against A. to compel payment of the bond so assigned—Decreed, that the Court of Chancery has no jurisdiction; that if the assignment was an extinguishment of the original debt, the complainant was not entitled to relief either at law or in equity; and if the assignment was not an extinguishment of the original debt, the complainant had his remedy at law on the original contract, there being no circumstances disclosed in the bill to make it necessary for him to resort to a Court of equity. *Gover vs. Christie*, 57.
  7. A specific performance of a bond for the conveying of lands, executed in 1777 by a father, in favor of his daughter, decreed, on a bill filed in 1797, although strongly contested on the ground that the bond was never executed, or if executed, that it was obtained by fraud. *Saunders et ux. vs. Simpson et ux.* 70.
  8. If a grant is for more land than is contained in the certificate of survey, it may be vacated in the Court of Chancery: and if it is for

EQUITY.—*Continued.*

- less land, the grantee's remedy, if any, is in equity. *Tolson vs. Lanham*, 150.
9. On a bill in Chancery to be relieved against a verdict and judgment, it appeared that the application in effect was, that the Chancellor act as a tribunal of appeal from the verdict. There was stated no surprise on the complainant whilst defendant at law; no discovery of testimony since the trial, and no sufficient proof of fraud. Decreed, that the facts set forth in the bill were not sufficient to warrant the Court to interpose and grant the relief prayed. *Contee vs. Cooke*, 154.
  10. A decree of the Chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review. *Hollingsworth vs. M'Donald*, 197.  
 A bill of review lies after the decree is signed and enrolled. *Ibid.*  
 A bill in the nature of a bill of review lies after the decree is made, but before enrolment. *Ibid.*  
 A decree must be considered as enrolled after it is signed by the Chancellor and filed by the register. *Ibid.*  
 A bill of review will only lie for two causes: Error apparent on the decree, or for some matter relevant, existing at the time of the decree, and discovered since. *Ibid.*  
 A bill of review cannot be supported for matter existing at the time of the decree and discovered since, without affidavit of such matter, and the existence of it at the time of the decree, to lay a foundation for applying to the Chancellor for his leave to file a bill of review, and obtaining such leave. *Ibid.*
- On petition suggesting proper matter supported by affidavit as the ground for filing a bill of review, the Chancellor exercises his judgment on the propriety of interfering or meddling with his decree for the cause disclosed, and grants or rejects the application accordingly. *Ibid.*
11. A. and B. entered into a bond to C. on which separate suits were brought, and judgments recovered. B. pays both judgments, and, as the surety, obtains an assignment of the judgment against A. from the attorney of C. and issued an execution in his own name as assignee of C. against A. on the judgment against him, for the whole sum of money recovered. A. filed a bill in Chancery against B. charging that the bond was for a joint debt due from both of them; that he had paid nearly one-half of the debt, and that B. was liable for the other half—also, that B. was indebted to him in a sum of money recovered by a decree in Chancery, which he refused to discount. Prayer for general relief, and for an injunction to stay the execution. Injunction granted. B. by his answer, denied that the debt was a joint one; that he was the surety of A. in the bond. He admitted the decree obtained, but that he had appealed therefrom, which appeal was depending and undetermined. *Decreed*, that B. was a co-principal with A. in the bond to C. on the ground that he received, in specifics, as his share of the personal estate of his father, (for whose debt the bond was given,) as a consideration for his becoming a principal in the bond with A.; that the injunction be dissolved, and that B. be permitted to take out

EQUITY.—*Continued.*

execution against A. on the judgment at law, for a balance found to be due from A. to B. with interest, &c. and that the execution be sued out in the name of C. for the use of B. *Norwood vs. Norwood*, 207.

12. The Court of Chancery cannot decree that a deed of conveyance, executed by a tenant in tail, may be recorded after the expiration of the time limited by law for the recording of deeds—an estate tail not being within the provision of the Act of 1785, ch. 72, s. 11. *Jones vs. Jones*, 245.
13. The Act of 1797, ch. 114, s. 4, directing, "that if a cause in the Court of Chancery is set down regularly for hearing, or submitted to the Chancellor, and one of the parties dies thereafter, and before a decree passed, the cause shall not abate, and the Chancellor may decree as if such party were alive," cannot take effect in a cause where there might be a decree for a reconveyance of land to the party dead, on paying or bringing money into Court. *Brogden vs. Walker*, 248.

The relief which may have been obtained by a complainant who has died, may be granted to his representatives reviving the suit. *Ibid.*

A representative, instituting an original suit, may have the same relief which his ancestor, deviser, testator, &c. might have had. *Ibid.*

14. Where a bill had been filed in the Court of Chancery under which testimony was taken and returned, and the bill afterwards dismissed by the complainant, who filed a new bill against the same defendants to obtain the same relief for which the former bill had been filed—on the petition of the defendant, *Held* by HANSON, Chancellor, that the testimony so taken in the former suit be received and read in evidence in the new suit. *Hopkins vs. Stump*, 262.

The Court of Chancery will not enforce a speculating contract for continental money. Per HANSON, C. *Ibid.*

An answer to a bill in Chancery will prevail, unless refuted by the testimony of two witnesses, or of one witness, with equitable circumstances. *Ibid.*

If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer plainly, fully and explicitly. If then, any material matter, charged in the bill, has been neither denied nor admitted by the answer, it stands on hearing of the cause for naught. Per HANSON, C. *Ibid.*

If A. has purchased land from B. and paid for it without receiving a conveyance, or if B. holds in trust for A. in either case A. has an interest liable to be taken and sold on a *fieri facias*, and the purchaser is entitled to the aid of the Court of Chancery to obtain the legal title. *Ibid.*

15. A. R. being indebted, as deputy sheriff and deputy collector, to R. A. suits were brought on his bonds as such, and judgments obtained thereon. A few days before the judgments were obtained, A. R. conveyed the whole of his real and personal estate to A. J. and R. B. who were sureties for him in the bonds before mentioned. R. A. filed a bill against A. R. A. J. and R. B. charging that the conveyance was fraudulently executed, with intent to deceive and

EQUITY.—*Continued.*

injure him. and though apparently for the consideration of £200, was in truth executed without consideration of money, but intended to guarantee and indemnify A. J. and R. B. as sureties in the bond; that A. R. retains possession of the property, and has sold a part thereof for his own benefit. Prayer for a disclosure of the trusts, and vacation of the deed, and for general relief. A. J. in his answer, stated that A. R. was indebted to him for money paid as his surety to other persons, and also indebted to him on open account, and for money lent. *Held* that the real and personal property, and increase, if any, remaining in the hands of A. R. A. J. and R. B. or any of them, be sold for the purpose of paying, in the first place, the sum of money due to R. A. *Amoss vs. Robinson*, 274.

16. Specific performance of a contract for the sale of land made by an intoxicated person refused. *Reinicker vs. Smith*, 361.
17. Ignorance of the law, as to the consequences of a creditor's accepting the bond of one of the partners for a simple contract debt, due from the partnership, is not a ground for relief in equity. *Williams vs. Hodgson*, 399.

Such a bond, although not binding on the partner who does not execute it, is obligatory on the one executing it. *Ibid.*

A complainant is not entitled to relief in Chancery against the executors of a joint obligor, who was a surety in the bond. Per HANSON, C. *Ibid.*

18. On a bill in Chancery for vacating a certificate of survey and grant, on the ground of fraud, committed by a forgery of the certificate—*Held*, that the Court of Chancery had jurisdiction, although the question of forgery of the same certificate had, in an action of ejectment between the same parties come collaterally before a Court of law and jury, and although that Court admitted evidence to establish the forgery, and the jury gave their verdict in favor of the defendant, who claimed under the certificate alleged to be forged. *Singery vs. Atty-Gen.* 411.

Although on a bill in Chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet that Court has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant, &c. from whence the injury has arisen, or will make such decree as the circumstances of the case render necessary. *Ibid.*

See BOND, 2.

CONTRACT, 1, 3.

EJECTMENT, 1.

ESCHEAT AND CONFISCATION, 3.

EVIDENCE, 23, 25.

FRAUD, 2.

JUDGMENT, 2.

MORTGAGE, 5.

STATUTE OF FRAUDS.

## ESCHEAT AND CONFISCATION.

1. If the heirs of J. S. in whom was the title to land, were living in Great Britain at the passage of the Acts of Confiscation, then an

ESCHEAT AND CONFISCATION.—*Continued.*

escheat warrant, issued to E. N. for the said land, issued without authority of law. *Owings vs. Norwood*, 82.

But a grant to him for the land surveyed under that warrant, came within the provisions of the 8th section of the Act of November, 1781, ch. 20. *Ibid.*

Such grant is valid to pass the land to E. N. notwithstanding he had not paid more than two-thirds of the appraised value of the land. *Ibid.*

Land liable to confiscation, may be granted by the State, under an escheat warrant. *Ibid.*

Such escheat grant will operate by relation, so as to give title from the date of the warrant or escheat. *Ibid.*

The 8th section of the Act of November, 1781, ch. 20, secured the land so escheated to the party, on his paying two-thirds of the value. *Ibid.*

The Court would not direct the jury that the plaintiff's escheat grant did not pass the land, the defendant claiming the same under a defective title. *Ibid.*

The State, by its commissioners, was in possession of all British property within the limits of the State, under and by virtue of the Acts of Confiscation. *Ibid.*

2. Lands which escheated to the Lord Proprietary, were by the Acts of October, 1780, ch. 45, and ch. 49, confiscated to and vested in the State, without office found, or an actual entry. *Hall vs. Gittings*, 96.

If land liable to escheat is included in a survey and grant under an escheat warrant on another tract of land, such grant will operate to pass a good title to the land so included, if there has been possession and payment of quit rents for more than 20 years before the Act of Confiscation. *Ibid.*

Land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract, but which afterwards became escheat, will not pass under such grant, and the State is not estopped from granting it to any other person. *Ibid.*

An escheat grant relates to, and operates to pass the whole of the original tract escheated. *Ibid.*

Land is not escheatable as long as there are heirs of the original tenant or grantee. *Ibid.*

Escheat is that possibility of interest which reverts to or devolves on the lord upon the failure of heirs of the original grantee, and he cannot grant the land again until that event happens; and if he does his grant will pass nothing. *Ibid.*

An escheat grant is *prima facie* evidence of title; but being only a presumption of right in the Proprietary, it only exists until the contrary is proved. *Ibid.*

The Act of October, 1780, ch. 49, vested the seisin and possession of all lands liable to confiscation in the commissioners, on behalf of the State, and divested the possession of all other persons. *Ibid.*

An adversary possession commencing against the Proprietary, ceased to operate against the State after the Act of Confiscation. *Ibid.*

3. By the Acts of Confiscation, the equitable interests of British subjects, in lands in this State, were confiscated without office found.



ESCHEAT AND CONFISCATION.—*Continued.*

or entry, or other act done, and although such equitable interests were not discovered until long after the treaty of peace. *Smith vs. The State*, 396.

See GRANT, 5.

MORTGAGE, 4.

## ESTATES TAIL.

1. A devise held to create an estate tail. *Laidler vs. Young*, 59.

Under the Act of November, 1782, ch. 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate. A common deed of bargain and sale operates to convey the estate and vest a fee simple in the grantee. *Ibid.*

If a limited interest is conveyed by a tenant in tail, upon the expiration of the particular interest, the tenant in tail again takes the estate tail as originally held. *Ibid.*

An estate tail cannot be devised under the Act of 1782, ch. 23. *Ibid.*

2. The *habendum* of a conveyance in trust, after vesting a life estate in R. P. uses the following expressions: "And from and after her decease, that T. P. and his heirs, forever, shall have and possess the said land and premises; and in case of his, the said T. P.'s death, without lawful issue, the said lands shall revert to, and be vested in, the said R. P. and her heirs, forever"—Held, T. P. took a fee tail, with a reversion in fee to R. P. *Hollingsworth vs. McDonald*, 197.

In a conveyance of a freehold or legal estate, technical words are appropriated by law to the creation or limitation of particular estates. *Ibid.*

3. A deed of conveyance, executed by a tenant in tail, and not enrolled within the time prescribed by law, but enrolled thereafter, and after the death of the tenant in tail, under a decree of the Court of Chancery for that purpose, cannot operate against the issue in tail. *Jones vs. Jones*, 245.
4. An estate tail held to be docked by a conveyance. *Brogden vs. Walker*, 248.
5. T. T. by his will dated in 1795, devised his lands to be equally divided between his two nephews, W. C. and W. S. to them and their heirs forever; and in case W. C. died without lawful issue, then he devised one-half of the lands to his nephew G. S. to him and his heirs forever. Held, as to a moiety of the lands devised to W. C. that on his death without lawful issue, the estate tail became extinct—and the limitation over to G. S. took effect, and one moiety of the lands vested in him in fee simple. *Smith vs. Smith*, 271.

The Act of 1786, ch. 45, to direct descents, as to estates tail general, and for transmitting the tenancy in tail to the issue of the tenant, is altered or changed only, by making the land descendible to all the children of the tenant in tail and their respective issue indefinitely. *Ibid.*

6. A devise held to create an estate-tail general. *Keys vs. Goldsborough*, 317.

## ESTOPPEL.

No person will be permitted to disaffirm his own sale. He cannot set up his discharge under an insolvent law, to disaffirm his prior acts. *Dorsey vs. Gassaway*, 345.

See EJECTMENT, 6.

## EVIDENCE.

1. In an action on an administration bond, the defendant pleaded *performance*, to which the plaintiff replied *non-performance*, assigning as a breach the non-payment of a legacy bequeathed to the plaintiff. The defendant rejoined *no assets* and payment, to which the plaintiff sur-rejoined *assets* and *non-payment*. The defendant offered evidence to show that the testator, at the time of his death, had due to him about 1,000*l.* the principal part of his personal estate, which sum was afterwards paid to the defendant, his executor, in depreciated continental currency, whereby a large part of the estate was lost; and the defendant further offered to show that he had proportionably, or nearly so, distributed the residue of the personal estate, among the legatees named in the will, *Held*, that such evidence was inadmissible. *Morgan vs. Slade*, 32.

In such an action, the burden of proof is on the plaintiff to show that the defendant had received assets. *Ibid.*

2. Parol evidence admitted to prove that the land granted to the husband of a demandant, is the same land of which dower is demanded. *Keefer vs. Young*, 45.
3. Parol evidence admitted to prove, that a debt secured by a mortgage was continental money, although expressed to be a specie debt. *Worthington vs. Bicknell*, 49.
4. Unless the contrary is proved, it is presumptive evidence that a clerk, who is dead, and who made certain entries on the books of his employer, delivered the goods, as charged. *Clarke vs. Magruder*, 66.
5. Ancient deeds and release, not necessary to be recorded, may be read in evidence. *Owings vs. Norwood*, 82.

The Court would not direct the jury to presume a title had been perfected, deeds having been produced showing a defective title had been transferred. *Ibid.*

6. If the testimony of a witness is intended to be objected to because of his holding adjoining lands, &c. his interest must be located on the plots. *Hall vs. Gittings*, 96.

The declaration of a former holder of the adjoining lands, as to the bounds of the land in dispute, admitted in evidence, it not appearing by the plots that he was interested in establishing the truth of the facts related by him. *Ibid.*

7. A deed located on the plots, and not counter-located by the opposite party may be read by the party locating it, to show how it is located, but when its validity comes in question if it is bad, it is to have no effect. *Hammond vs. Norris*, 111.

Parol evidence is not admitted to prove that a tract of land included in a certificate of survey, never was actually surveyed by the surveyor. *Ibid.*

Parol evidence admitted with the consent of the parties, to prove the law, practice and usages, of the land office, before the Revolution. *Ibid.*

EVIDENCE.—*Continued.*

A deed for 86 acres of land, (being part of a tract.) without courses or distances, but referring to another deed, (not produced,) to ascertain the same, is not legal evidence to show title, or to support the location thereof on the plots, without producing the deed to which it refers. *Ibid.*

Nor were certain facts and circumstances admissible to prove the location of the 86 acres, or to show title thereto, or that the deed referred to, or some bond or contract for conveying the 86 acres by metes and bounds, &c. as located on the plots, had ever been executed. *Ibid.*

8. The rules of the land office cannot be proved by witnesses; they are to be found on the records of that office, and in the proclamations of the Proprietary. *Hammond vs. Warfield*, 180.

A petition to the Judges of the land office by T. D. with certain alterations made therein in the hand-writing of a clerk in that office, (now dead,) stating when a certificate was returned, not permitted to be given in evidence, as a circumstance to prove at what time the certificate was returned, or to prove it was returned before a certain period, as the party against whom the testimony is intended to operate does not derive any interest in the land in question under T. D. *Ibid.*

9. Parol evidence is not admissible to prove that a deed of manumission was attested in the presence of two witnesses, only one having signed the same. *Negro James vs. Gaither*, 151.

10. Parol evidence admitted to prove the manner in which wills are made and proved in France. *De Sobry vs. De Laistre*, 164.

A copy of a will executed in Philadelphia and transmitted to the Island of Martinique by the testator, certified by a notary public of that Island, and returned under a commission issued to take testimony, is sufficiently authenticated by having the certificate of the chief colonial officer as to the signature of the notary public; and which, with the testimony of the testamentary executor, returned under the commission, is sufficiently proved, and may be read in evidence as the will of the deceased. *Ibid.*

Proof of the French laws in testamentary affairs, returned under commissions issued to take testimony, and admitted in evidence. *Ibid.*

The seal of the Court of a foreign country does not prove itself; but it must be proved by testimony. *Ibid.*

Parol evidence admitted to prove the seal of the Court of a foreign country. *Ibid.*

The letters of a witness permitted to be read in evidence to impeach his credit as to what he had sworn upon his examination taken under a commission, contradictory to the contents of the letters, but not to prove any other fact. *Ibid.*

If a contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed. *Ibid.*

If the plaintiff in an action of *assumpsit* files an account in Court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that he had elected by his account to consider the defendant his debtor. *Ibid.*

EVIDENCE.—*Continued.*

11. In an action of debt upon a guardian's bond, dated in 1797, the plaintiff proved by a witness, that land of the plaintiff was during his minority, rented by the guardian to the witness, in 1791, and that the rent was afterwards lessened, in consequence of an agreement between them, that the witness should take charge of the defendant's stock upon the land—Held, that such evidence was inadmissible. *Gunby vs. Selby*, 212.
  12. A copy of a paper, purporting to be an additional inventory to the inventory of the estate of the deceased, certified under the hand and seal of the Register of Wills to be a true copy taken from the original additional inventory offered. (not proved,) by the administrator, and lodged in the office of the register—Held not to be competent evidence to charge the administrator with the amount of the goods and chattels therein mentioned. *Emory vs. Thompson*, 213.
- An original paper, purporting to be an "additional inventory to the inventory of the deceased, offered by the administrator," proved to be in the hand-writing of a person who acted as a clerk for the administrator, and endorsed "additional inventory," in the hand-writing of the administrator, found among the papers in the office of the Register of Wills, wrapped up in the original inventory of the estate of the deceased—Held to be competent evidence to charge the administrator with the several sums of money specified in the said paper, as part of the goods and chattels of the deceased. *Ibid.*
13. Entries in a book purporting to be, and proved by a witness who was formerly register of the vestry, to be handed down to him as the vestry book of the parish, held inadmissible to prove title in an action of ejectment. *Martin vs. Gunby*, 217.
  14. A deposition taken on the survey of a witness, who was absent from the State at the time of the trial, was permitted to be read in evidence, due diligence having been used to obtain the attendance of the witness. *Howard vs. Moale*, 218.
  15. Where the facts offered in evidence by the plaintiff were not sufficient and legal evidence to warrant the jury in finding that a person, under whom the plaintiff claimed, died seized of the land for which the ejectment was brought, in opposition to 60 years possession of the defendant—The strongest presumption of a good title, being in favor of the defendant. *Davis vs. Davis*, 257.
  16. Where the attorney of the plaintiff had given the defendant a receipt for a sum of money, stated to be in full of the judgment, but which was for a less sum than the amount due—Held, that the receipt was not conclusive evidence that the judgment was satisfied so far as to prevent the plaintiff from taking out execution on the judgment for any balance which might be actually due thereon. *Hughes vs. O'Donnell*, 277.
  17. In an action of trespass *q. c. f.* the plaintiff offered to prove that he was in possession of the land on which the trespass was alleged to have been committed, and that the defendant committed the trespass complained of on the land so in possession of the plaintiff, at the place by him located on the plots in the cause—Held, that such evidence was admissible. *Hogmire vs. McCoy*, 300.

EVIDENCE—*Continued.*

The plaintiff proved by a witness that he was present when the land, on which the trespass was alleged to have been committed, was originally located or taken up, and that it was then located, as it now is, on the plots,—*Held*, that the evidence was admissible to prove the original beginning and location of the tract of land. *Ibid.*

18. In a petition for freedom, the following part of the deposition of a witness was held to be competent evidence—"and always understood she, (the ancestor of the petitioner) came from R. N. but did not know it of his own knowledge, and heard that she went by the name of P. S." As also this part of the deposition of another witness, "That his mother, in her life-time, told him it was generally reported, and she always understood, that a woman named P. S. came to the family of J. L. from the family of R. N." *Shorter vs. Boswell*, 308.

A record book of Charles County Court, containing the certificate and affidavit of a priest in 1702, that he had, in 1681, in Saint Mary's County, married a negro man named L. R. to a white woman named E. S. both servants of W. R. an affidavit of a person who was present at the marriage, proving the same, as also the issue by the marriage, and an entry from the parish register of the latter county, stating that the above were therein recorded in 1702, and the whole recorded in the above record book in 1703, the entry thereof in the record book, (there being proof of the loss of the originals and of the parish register) was offered in evidence, in a petition for freedom, by a person claiming as a descendant from E. S. to prove the existence of a free white woman named E. S. in the family of W. R. her marriage, and the issue by that marriage, and was held to be admissible evidence. *Ibid.*

19. A. P. by his will, devised to C. C. & A. M. all his real estate, to be sold by them for the payment of his debts. Evidence of a sale made at auction by them to W. G. of a part of the real estate, together with a memorandum of the sale, subscribed by the auctioneer, and a receipt given by them for the purchase money—*Held* to be admissible evidence to show a title at law in W. G. without a deed of bargain and sale, or other conveyance, to him from the trustees, and to be sufficient to enable his lessee to recover such real estate in an action of ejectment. *Keys vs. Goldsborough*, 317.
20. The defendant, as surety for F. B. on a bond for the payment of money given to the plaintiff as trustee for the sale of an estate, having pleaded payment, at the trial offered to file an account in bar, claiming in the name of F. B. a sum of money due to him as his proportion of the amount of the sales of the said estate—*Held*, that the account could not be filed. *Gantt vs. Bowie*, 321.

To establish the above account in bar, the defendant offered to read a copy, under seal, of a decree of the Court of Chancery, for the sale of the estate of J. E. and the appointment of the plaintiff trustee to make the sale, and the trustee's report of the sale and ratification by the Chancellor, together with the auditor's statement and ratification thereof showing the proportion due to the creditors, and among others of the sum due to F. B. above named, and

EVIDENCE.—*Continued.*

claimed to be set off—*Held*, that such evidence was inadmissible. *Ibid*.

The plaintiff to show that F. B. was not entitled to the proportion adjudged to him out of the proceeds of the sale of the real estate of J. E.; and to prove that F. B. was one of the sureties in the administration on the personal estate of J. E. and that it had been misapplied, and not legally administered, offered in evidence the administration bond, and an account signed by F. B. for the administration—*Held*, that the evidence was not admissible. *Ibid*.

21. If the possession of land has gone agreeably to an ancient deed, which needed no enrolment, the *inspeximus* of the deed may be read in evidence, and is effectual to pass the land. *Hall vs. Gittings*, 326.

Where a deed for part of a tract of land has not been particularly located on the plots in the cause, it may be read in evidence if the whole tract is united in the same person, and the whole has been located. *Ibid*.

A *feme covert*, one of the grantors in a deed conveying a tract of land, the acknowledgment of which by her having been declared defective, was admitted to give evidence on the part of the defendant in an action of ejectment brought for the same land by a person claiming under her deed. *Ibid*.

22. What is alleged as a motive or inducement in the deposition made by a witness, may be read in evidence. *Bryden vs. Taylor*, 340.

23. The admissions by counsel of certain facts in a special verdict taken at a former trial between the same parties in the same action, are not evidence at a new trial of the same cause. *Dorsey vs. Gassaway*, 345.

Certain facts refused to be admitted in evidence to prove, that a person who purchased certain slaves, and had made a voluntary gift of them, never paid any consideration for the slaves. *Ibid*.

Certain acts and declarations of the defendant, subsequent to his sale of the slaves for which an action of replevin was brought, and before his insolvency, are not evidence to defeat the claim of the plaintiff. *Ibid*.

An affidavit made by a debtor, and payment into the treasury under the tender law, admitted in evidence to prove the person was indebted, and made the payment into the treasury. *Ibid*.

Proceedings in Chancery under an insolvent law, are not evidence in favor of the person who had obtained the benefit of that law, to prove an acknowledgment and admission by him on his application for the benefit of that law. *Ibid*.

A bill in Chancery, with all the proceedings and decree thereon, cannot be read in evidence in an action between different parties from those named in the proceedings. *Ibid*.

An answer in Chancery, made by the respondents from information derived from the present defendant, is not admissible in evidence. But the declarations of the defendant are admissible evidence: and a witness may recur to the answer to refresh his memory as to the declarations made to him by the defendant. *Ibid*.

EVIDENCE.—*Continued.*

Declarations made by the defendant before and after his discharge under an insolvent law, may be given in evidence against him. *Ibid.*

24. Parol evidence may be admitted to explain the doubtful parts of an agreement reduced to writing; but not to prove a different or additional agreement. *Morrison vs. Galloway*, 387.

See ACTION.

25. W. being seized of a tract of land called P. containing 275 acres, executed a bond of conveyance to J. conditioned that he would convey to him all his right, &c. "of, in and to, 120 acres of land called P. situate," &c. On a bill in Chancery for a specific performance, &c. *Held*.

That there being no designation of the 120 acres of land, nor any description whereby it could be identified and located, parol evidence is not admissible to show that it was intended by the parties that they were to be laid off at the southernmost part of the tract. That the bond is void for uncertainty, except on the principle of election, and that there was no evidence to prove that there was any election made by either of the parties anterior to the time of the execution of the deed from W. for part of the tract described by metes and bounds, to one of the defendants who was a fair and *bona fide* purchaser of the land conveyed to him, without notice that there was any designation of the 120 acres, and held that J. was entitled to 120 acres out of that part of the land not conveyed to the said defendant. *Huntt vs. Gist*, 420.

See CONFLICT OF LAWS.

DEED, 2.

DEPOSITION, 5.

EJECTMENT, 7.

EQUITY, 14.

EXECUTORS AND ADMINISTRATORS, 4.

GRANT, 5, 6, 8.

JUSTICE OF THE PEACE.

LAW AND FACT, 2.

MORTGAGE, 2.

PARTNERSHIP, 1.

REPLEVIN, 1.

SALE, 3.

TRESPASS, 1.

WILLS, 1.

EXECUTION.

1. After a *fi. facias* has been laid, and before a sale of the property seized thereunder, a writ of error, (bond with surety having been approved) does not operate to stay further proceedings under the *fi. facias*. *Beatty vs. Chapline*, 7.
2. A judgment having been obtained by B. against E. and C. his surety, a *fi. fa.* issued thereon against E. who survived C. and was laid on E's lands. The administrator of C. paid the amount of the judgment to B. who directed the judgment to be entered for the use of the administrator of C. A *venditioni exponas*, issued for the use of the administrator of C. for a sale of the lands, was returned

EXECUTION.—*Continued.*

unsold, and was, on motion of the defendant, quashed. *Berry vs. Nicholls*, 428.

See ATTACHMENT, 1.

EQUITY, 11.

EVIDENCE, 16.

INSOLVENT.

SCIRE FACIAS.

## EXECUTORS AND ADMINISTRATORS.

1. Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled.

An executor *pro forma* is accountable to the testamentary executor only for the surplus remaining after payment of debts. *De Sobry vs. De Laistre*, 164.

2. On the issue, joined to a plea of *plene administravit*, the plaintiff did not offer evidence of any assets which had come to the hands of the defendants, (the executors)—*Held*, that it was necessary for the plaintiff to show that assets had come to the hands of the executors, and that the plea was not an admission of assets to the amount of the plaintiff's claim, although the executors did not prove the contrary by the production of the inventory, or by other evidence. *Wilson vs. Slade*, 244.
3. An administrator may issue an attachment on warrant under the Act of 1795, ch. 56. *M'Coy vs. Swan*, 293.
4. The not returning an inventory on the estate of an intestate by his administrator, is not sufficient evidence to charge the administrator with a debt of the intestate. *Leeke vs. Beanes*, 321.
5. On the death of a defendant in an action of debt, &c. a summons may issue to an executor *de son tort*, (there being no legal executor or administrator of the deceased.) to appear to and defend the action. *Norfolk vs. Gantt*, 373.

Where an executor *de son tort*, being summoned, appeared to an action of debt brought against the deceased, and confessed the action, and admitted the debt was due to the plaintiff; an auditor was then appointed to ascertain the sum for which judgment should be rendered, regard being had to the assets, &c. according to the Act of 1798, ch. 101, sub-ch. 8, s. 9. This appointment of auditor was afterwards stricken out by the County Court, and a judgment was rendered on the confession above mentioned, for the debt and costs *de bonis testatoris, si non de bonis propriis* as to costs. Error being brought, the judgment was reversed by the Court of Appeals. *Norfolk vs. Gantt*, 373.

6. An administrator must comply with an order of the Orphans' Court directing a sale of the personal estate of the deceased for the payment of debts, and cannot retain the property at the appraised value, on paying the debts out of his own funds to the amount of the appraisement. *Hall vs. Griffith*, 407.



EXECUTORS AND ADMINISTRATORS.—*Continued.*

After payment of the debts of the deceased, and all legal costs and charges attending the administration, the administrator must deliver over the residue of the personal estate specifically to the representatives of the deceased. *Ibid.*

Where an administrator retained a part of the personal estate of the deceased, at the appraised value, and sold a part for the benefit of the estate, and a part as his own property—*Held*, that he must account for the increase of the slaves, and for the use, labor and hire of all slaves retained or hired by him; and where one of the slaves had run away, he must account for such slave at the appraised value, unless he used all reasonable endeavors to regain possession of such slave. He is to be allowed for money expended in clothing and maintaining such of the slaves as were unable to work, and in bringing up, clothing, &c. the increase of slaves, so long as they continued a charge. Also for all debts paid; for his commission, and all legal costs. He is to be charged with the amount of the inventory: with the sum gained on the sales of the property, and with the debts received. *Ibid.*

See EVIDENCE, 1, 12.

## FRAUD.

1. Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case. *Brogden vs. Walker*, 218.
2. A bill to vacate a conveyance on the ground of fraud, filed after the lapse of many years, dismissed. *Hamilton vs. Beall*, 356.

See EQUITY, 15, 18.

GRANT, 6, 8.

MORTGAGE, 6.

## GRANT.

1. If there are two descriptions of the land conveyed, the one by name, and the other by metes and bounds, &c. the grant will operate to pass the land according to that description which is most beneficial to the grantee. *Hall vs. Gittings*, 96.
  2. The efficient qualities of the different kinds of warrants used to take up vacant lands, set out. *Hammond vs. Norris*, 111.
- A person who takes out a warrant of resurvey, without having a title to the original tract resurveyed, acquires an equitable interest in the vacant land added, when the composition money is paid; and his grant therefor will relate to the date of the certificate of resurvey, if it appears that his certificate was returned to the land office previous to the time when a prior grant for the same land issued on a junior certificate of survey, made and compounded on after the composition money was paid upon his certificate, and unless it was so returned, the prior grantee was a fair purchaser without notice of such equitable interest, and his grant cannot be overreached or defeated by relation. *Ibid.*
3. Where a warrant of resurvey, taken out by J. H. who was not seized of the original tract resurveyed, was located on vacant land not contiguous to such original tract, his grant therefor will operate by relation to the date of the certificate of resurvey, if the composition money was paid in time, and the certificate of resurvey was returned

GRANT.—*Continued.*

- to and in the land office, when a warrant of resurvey issued to J. C. to affect the vacant land included in J. H's certificate; or if the composition money was not paid in time by J. C. on his resurvey, and J. H's certificate was in the office when J. C. did compound, the grant to J. H. will relate to the date of the certificate. *Hammond vs. Warfield*, 130.
- But if J. H's certificate was not in the office when the warrant issued to J. C. and J. C. compounded on his resurvey in time; or if J. H's certificate was not in the office when J. C. did compound, though not in time, and obtained his grant, then J. C. was a fair purchaser for a valuable consideration without notice of the equitable interest of J. H. and the grant to J. C. cannot be overreached by relation. *Ibid.*
- If vacant land, not contiguous to the original tract resurveyed, is included in the certificate of resurvey, it is not legal notice of the location of the warrant, until the certificate is returned to the land office. *Ibid.*
- If an assigned land warrant was applied in time to the payment of composition money on vacant land included in a certificate of resurvey, such application will be equivalent to the payment of so much money. *Ibid.*
4. A grant of land is to be construed most favorably for the grantee. *Tolson vs. Lanham*, 150.
- Land included in a grant, but excluded from the certificate of survey on which the grant issued, cannot be taken up as vacant land. *Ibid.*
- A grant of land cannot be corrected or controlled by the certificate of survey, but will pass the land comprehended within the courses and distances expressed in the grant. *Ibid.*
5. No interest in the nature of a trust estate ever was vested either in the Proprietary, or in the State in the place of the Proprietary, no act having been done which could create a trust in either; and they could only be considered as parties having a reversionary interest expectant on the determination of an estate tail. *Howard vs. Moale*, 218.
- The *jura regalia*, as attached to the person of the King of England, never did attach to the Lord Proprietary of Maryland. *Ibid.*
- The Proprietary held the dominion of Maryland, and property of the soil, which he could sell and dispose of in the same manner, as any other person, and subject to the same beneficiary, legal and equitable rights, as in the hands of any other person. *Ibid.*
- On an equitable interest being obtained in land agreeably to the rules of the land office, the party became entitled to a grant which he could compel of the Proprietary. *Ibid.*
- The reversionary interest of the Proprietary reserved in lands granted by him, might be destroyed by deed made by the tenant in tail, under the Act of June, 1773, ch. 1. as effectually as the reversionary right of any individual. *Ibid.*
- The State held the Proprietary's reversionary interest merely by substitution in his place, and a deed since the Act of November, 1782, ch. 23, was competent to bar and extinguish the reversionary interest of the State. *Ibid.*

GRANT.—*Continued.*

A grant for escheat land will relate back to the original grant. *Ibid.*

A subsequent grant, covering land in which the Proprietary had a reversionary interest, will operate to pass such reversionary interest. *Ibid.*

A grant of land surveyed under a common warrant, will not pass land not then liable to escheat, but which afterwards became escheat, and as such granted to a third person. *Ibid.*

An escheat certificate and grant do, by operation of law, relate to the original tract. *Ibid.*

Where a junior survey calls to a tree as the beginning of another tract, and then to run with it to the 2nd and 3rd boundaries of the original tract, such junior survey must run to, and be governed by, the lines of the original tract, if the bounds thereof are known, as they are also the bounds of the junior survey; but if they are not known, the junior survey must then be governed by the legal location of the elder tract, as the same can be ascertained at the trial. *Ibid.*

Where the plaintiff has not located his escheat grant on the plots in the cause co-extensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant. *Ibid.*

The plaintiff cannot give any evidence of the lines of his escheat grant, running otherwise than he has located them on the plots in the cause as his pretensions; but he is not precluded from giving evidence of any other lines, as the lines of the original tract, by way of illustration; and he may support the location of his pretensions, so far as he can show that they are located within the limits of the original tract. *Ibid.*

From the place where the second line of a tract of land terminated, the third line thereof, viz. "Then N. N. W. 86 ps. to a bounded red oak, then," &c. must run the number of perches expressed in the grant, and cannot in its length be increased or diminished, unless proof is made of the tree called for, or the place where it stood. *Ibid.*

A private plot of the lands in dispute, permitted, under certain circumstances, to be read in evidence. *Ibid.*

The course and distance expressed in a grant of land, must always be controlled by a call expressed therein as the termination of the course. *Ibid.*

The Court refused to direct the jury, that the second line of a tract of land, must terminate at the end of 150 ps. from the beginning thereof, it being a matter of fact to be left to the determination of the jury. *Ibid.*

The Court refused to direct the jury, that an escheat grant did not pass any land included in the original grant, except the same was included within the metes and bounds of the escheat grant, as particularly described; and that the escheat grant did not, by legal operation, convey all the land included within the original grant, unless the particular metes and bounds of the escheat grant did also include the same. *Ibid.*

6. A surveyor's original book of surveys, and his parol testimony, admitted by the General Court, in an action of ejectment, as com-

GRANT.—*Continued.*

petent evidence to prove that a certificate of survey returned to the land office, was forged. *Boreing vs. Singery*, 382.

The General Court refused to direct the jury, that it is not competent in a Court of law to give evidence to the jury, or to go into any parol examination of the surveyor, or his books, to vacate a grant, or to prove that the certificate of survey returned to the land office as a foundation for the grant, was forged or fraudulent, and not made out by him or his authority. *Ibid.*

The Proprietary instructions, requiring a survey to be made of reserved lands, &c. read in evidence. *Ibid.*

7. A bill in Chancery to vacate a grant dismissed. *Atty-Gen. vs. Jarrett*, 397.

8. Fraud may be inquired into as well at law as in equity; and where frauds are clearly established, the Courts of law and of equity have concurrent jurisdiction. *Singery vs. Atty-Gen.* 411.

Where the fact of the forgery of a certificate of survey, under the grant on which the defendant claimed, came before the Court and jury collaterally, the verdict in favor of the defendant, cannot be received as evidence to prove that the certificate was not forged. *Ibid.*

See EJECTMENT, 5, 7.

EQUITY, 8.

ESCHEAT AND CONFISCATION, 1, 2.

EVIDENCE, 8.

LAW AND FACT, 1.

## GUARANTY.

D. G. in a letter of credit to R. and B. in favor of H. and G. used the following expressions: "I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house." Held, that the guaranty was an absolute one, and to continue until countermanded by D. G. *Grant vs. Ridsdale*, 160.

## GUARDIAN AND WARD.

See EVIDENCE, 11.

TROVER, 1.

## HUSBAND AND WIFE.

A *feme covert* cannot transfer or pass her interest in land to another, unless by fine, common recovery or deed executed and acknowledged according to the mode prescribed by the Act of 1715, ch. 47. *Hollingsworth vs. M'Donald*, 197.

See DEEDS, 1, 3.

EVIDENCE, 18.

## INDICTMENT.

See CRIMINAL LAW.

## INSOLVENT.

Property acquired by an insolvent debtor, after he has been legally discharged under the insolvent law of 1774, ch. 28, otherwise than "by descent, gift, devise, bequest or in a course of distribution," is not liable for debts contracted prior to his discharge; and if it is liable, it cannot be affected by a *fieri facias*, without a *scire facias*

INSOLVENT.—*Continued.*

having previously issued, if a year and a day has elapsed. *Pollitt vs. Parsons*, 52.

See ESTOPPEL.

EVIDENCE, 23.

MORTGAGE, 6.

## JUDGMENT.

1. A judgment by confession is an admission of the right of the nominal plaintiff to recover the penalty of a bond having a collateral condition; and whether the judgment is in the right of the plaintiff, or for the use of another, is not material, and cannot be a cause for reversing it. *M'Mechen vs. The Mayor, &c.* 35.

2. When the money is paid, the vendee is entitled to a conveyance. A judgment obtained by a third person against the vendor *mesne* the making the contract and payment of the money, cannot defeat the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*. *Hampson vs. Edelen*, 55.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment. But the legal estate in the land is not vested in the judgment creditor, although he can convert it into money to satisfy his debt, by pursuing the proper means. *Ibid.*

See ATTACHMENT, 1.

DOWER, 2.

EJECTMENT, 7.

EQUITY, 11.

EVIDENCE, 16.

EXECUTORS AND ADMINISTRATORS, 5.

SCIRE FACIAS.

SLANDER, 1.

## JUSTICE OF THE PEACE.

When a person acted in the character of a Justice of the Peace, although he did not so style himself, yet it is *prima facie* evidence that he had authority to act as such. *Bryden vs. Taylor*, 340.

## LAW AND FACT.

1. The Courts will take notice of the rules of the land office as forming regulations relative to property, and will direct the jury as to the law arising from such rules.

The time when a certificate was returned to the land office, is a matter of fact determinable by the jury, and the jury are to find when the composition money was paid on a certificate of survey. *Hammond, et al. vs. Warfield*, 130.

2. The laws of a foreign country are to be proved by evidence, and the Court are to decide what is proper evidence of such laws, and to construe them, and judge of their applicability to the question before the Court. *De Sobry vs. De Laistre*, 164.

The laws of France are matters of fact to be found by the jury upon evidence to be produced to them. *Ibid.*

See EVIDENCE, 24.

GRANT, 3, 6.

SALE, 3.

## LIMITATIONS.

1. In *assumpsit* for work and labor, the Act of Limitations was pleaded—*Held* that evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town he would have the business settled, was sufficient to defeat the operation of the Act of Limitations. *Poe vs. Conway*, 268.
2. Where the defendant was in possession of, and holding a slave, for the space of three years antecedent to the institution of an action of replevin against him for the slave—*Held*, that the Statute of Limitations was a bar to the plaintiff's recovery, notwithstanding the property in the slave had been in the plaintiff, and the slave was by him loaned for an indefinite time to J. S. who during that loan sold the slave to the defendant; and although the suit was brought within three years from the time the plaintiff knew of such sale. *Rattrie vs. Stenders*, 279.

See EJECTMENT, 2.

## LORD PROPRIETARY.

See EJECTMENT, 2.

GRANT, 5.

## MARKET-OVERT.

See SALE, 1.

## MORTGAGE.

1. The assignee of a mortgage is entitled to the same relief that the mortgagor would have been entitled to against the mortgagee. *Worthington vs. Bicknell*, 49.
2. Where certain facts would not warrant the presuming a mortgage made in 1706, was satisfied before 1780, the mortgagee being a resident of Great Britain, and although he was never in possession of the mortgaged premises—the party not showing any title under the mortgagor. *Owings vs. Norwood*, 82.

Where lands were mortgaged to a British subject, on failure of payment of the mortgage money, a complete legal estate vested in the mortgagee, liable to confiscation, and was vested in the State under the Acts of Confiscation, subject to the right of redemption; and the British treaty cannot operate on such a case. *Ibid*.

3. A mortgagor cannot support an ejectment for the land mortgaged, unless he can show that the mortgage had been satisfied previous to the bringing the ejectment. *Beall vs. Harwood*, 144.
4. A mortgage of lands to a British subject before the Revolution, was not thereafter defeated by the Act of Confiscation, but it was protected by the British treaty, and the mortgage property was decreed to be sold to pay the mortgage debt. *Howard vs. Moale*, 218.
5. Where a weak and intemperate young man, who was conscious of his inability to manage his own concerns, made an absolute deed of all his property, real and personal, to a relation to whom he was indebted in a sum much less than the value of the property conveyed, the deed was held, on a bill filed in equity, by the grantor against the grantee, to be a mortgage, although the answer denied all fraud and maintained that the deed was intended as an absolute conveyance, and no fraud was proved in the case. *Brogden vs. Walker*, 248.

**MORTGAGE.**—*Continued.*

6. If a mortgage of slaves was subsisting, and the mortgagor claiming the absolute ownership of them, sold them for a full consideration, although as to the mortgage, the sale would transfer only the equitable interest, yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee, and notwithstanding the after discharge of the vendor, under an insolvent law, and his purchase of the slaves from the mortgagee, his subsequent acts, in perfecting his title to the slaves, will enure in law to confirm, and not to defeat, his contract with the vendee. *Dorsey vs. Gassaway*, 345.

If a debt is due on mortgage and on open account, and partial payments are made by the debtor, without any application, the law will apply the payments to the mortgage debt. *Ibid.*

Payments made by a mortgagor are not to be applied to discharge a debt due on the mortgage, in favor of a purchaser of part of the property mortgaged, who had not paid for it, and who had made a gift thereof to his son, to defraud his creditors. *Ibid.*

See EQUITY, 4.

ESTATES TAIL, 1.

EVIDENCE, 3.

**PARTNERSHIP.**

1. Where a person was frequently seen in the counting house of the plaintiff, transacting business as a principal, and was generally supposed, believed and understood in the town, to be a partner in the house of the plaintiff, *held* not sufficient evidence to prove that such person was a partner of the house of the plaintiff. *Bryden vs. Taylor*, 340.
2. A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity. *Williams vs. Hodgson*, 399.

See ACTION, 1.

EQUITY, 17.

EVIDENCE, 24.

TROVER, 2.

**PAYMENT.**

See MORTGAGE, 6.

**PLEADING.**

1. Where a defendant, having pleaded general performance to a bond with a collateral condition, and without a replication on the part of the plaintiff assigning breaches, withdrew his plea, and confessed judgment—*Held*, that such judgment admits the plaintiff's claim to the extent of the penalty of the bond on which the action was brought. *M'Mechen vs. The Mayor, &c.* 35.
2. Where the judgment of the General Court, after a general verdict in *assumpsit*, was reversed, because of a defective count in the declaration. *Grant vs. Ridsdale*, 160.

See APPEAL AND ERROR, 4.

CRIMINAL LAW, 2.

DEBTOR AND CREDITOR, 3.

PLEADING.—*Continued.*

See EQUITY, 14.

EJECTMENT, 6.

EXECUTORS AND ADMINISTRATORS, 2.

REPLEVIN, 1.

SLANDER, 2.

## PRINCIPAL AND SURETY.

A surety is not answerable beyond his engagement. *M'Mechen vs. The Mayor, &c.* 35.

See EQUITY, 1. 11. 15. 17.

## REPLEVIN.

1. If the declaration in an action of replevin does not allege damage to have been sustained, it is fatal.

Where the declaration in replevin stated the taking of the property to be in Gay street. from the dwelling-house of the plaintiff—*Held.* that evidence of the defendant's having taken the property in Gay street. was sufficient without proving that he took it from the dwelling-house of the plaintiff. *Faget vs. Brayton*, 299.

2. In an action of replevin, the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained. *Dorsey vs. Gassaway*, 345.

See EVIDENCE, 23.

## SALE.

1. The purchasing a horse at a public market established by law for the sale of horses, &c. does not entitle the purchaser to hold the horse against the claim of the true owner.

There is no market-overt in this State. *Browning vs. Magill*, 269.

2. If the seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and they afterwards appear to be different, the purchaser may return the goods, and recover back the money, in an action for money had and received; or he may have his action without a return of the goods, if he give notice to the seller where they are deposited. *Rutter vs. Blake*, 302.

3. If slaves remain in the possession of the vendor, the bill of sale must be recorded; and whether they remained in his possession, is a matter of fact for the jury: if they find they were not in his possession, the bill of sale is not required to be recorded; and it is not evidence, although it was recorded, unless the execution of it is proved. *Dorsey vs. Gassaway*, 345.

See DEBTOR AND CREDITOR, 1.

EVIDENCE, 19, 23.

EXECUTION, 2.

## SCIRE FACIAS.

If the defendant during the pendency of a *scire facias*, on a judgment against him, aliens his lands, the plaintiff, after a *fiat* on the *scire facias* may issue a *feri facias*, and levy it on the lands so aliened, without proceeding against the alienees. *M'Elderry vs. Smith*, 62.

See INSOLVENT.



## SET-OFF.

The defendant may set-off, against the plaintiff's demand, a note of the plaintiff's accrued subsequent to the commencement of the action. *Clarke vs. Magruder*, 67.

## SLANDER.

1. In an action of slander for words spoken, it was alleged that the defendant had charged the plaintiff with poisoning his, the defendant's horse—*Held*, that the words were not actionable. *Chapin vs. Cruikshanks*, 215.

The Court refused to direct the jury, that if the horse was alive, the words laid in the declaration were not actionable, the same being irrelevant to the issue. *Ibid*.

The Court also refused to direct the jury, that if the words spoken did not amount to an offence for which the plaintiff might be indicted, they were not actionable, as the defendant might take advantage of it in arrest of judgment. *Ibid*.

2. In an action of slander, the words charged to have been spoken were, that "he the said J. swore false, and swore to a lie"—*innuendo*, "meaning that the said J. had committed perjury; that the said J. had taken a false oath before a magistrate"—*Held* not to be actionable. *Sheely vs. Biggs*, 311.

No words are actionable unless they impute a crime to the plaintiff which subjects him to punishment. *Ibid*.

The office of the *innuendo* is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; but if the words in themselves are not actionable, their meaning cannot be extended by the *innuendo* to make them actionable. *Ibid*.

If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part, to show they were spoken in a criminal sense, or they are not actionable. *Ibid*.

To make the word forsworn, slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding, in which the party was sworn. *Ibid*.

## SLAVES.

1. A deed of manumission under the Act of 1752, ch. 1, s. 5, executed in the presence of only one witness, will not operate to give freedom to the slaves mentioned therein. *Negro James vs. Gaither*, 151.
2. A slave sold by parol for a term of seven years with an agreement between the vendor and vendee that at the end of the seven years he was to be manumitted, by the vendee. At the end of that time the vendee executed a deed of manumission. *Held*, that the slave was free. *Negro Cato vs. Howard*, 296.
3. On the death of S. E. a resident of this State, a slave belonging to his estate, was, by a bill of sale executed by his administrator in 1792, sold to G. D. also a resident of this State, but who immediately afterwards removed to Virginia, and took the slave with him. On a petition filed by the slave against G. D. for his freedom—*Held*, that he was not entitled to freedom. *Negro George vs. Dennis*, 381.

See EVIDENCE, 9, 18.

TROVER, 1.

WILLS, 3.

## SPECIFIC PERFORMANCE.

See EQUITY.

## STATUTES,

## I. CONSTRUCTION AND EFFECT.

The intention and meaning of the Legislature are to be collected from the law itself. and they are not to be restrained by anything in the preamble. *Laidler vs. Young*, 59.

In the construction of an Act of Assembly, the intention of the Legislature is to prevail, and is to be collected from the whole of the law, and the circumstances which produced it. *Ibid*.

Where a statute recited that A. who was living, had only female heirs, and proceeded to vest an estate in said female heirs, and it appeared that A. had two daughters named B. and C. and no other children. *Held*, that by the words female heirs were meant the two daughters of A. *Beall vs. Harwood*, 144.

## II. ACTS OF ASSEMBLY.

- 1715, c. 47. *Hollingsworth vs. M'Donald*, 197.
- 1752, c. 1. *Negro James vs. Gaither*, 151.
- 1766, c. 14. *Hall vs. Gittings*, 326.
- 1773, c. 1. *Hezard vs. Moale*, 218.
- 1774, c. 28. *Pollitt vs. Parsons*, 52.
- 1779, c. 8. *Bryden vs. Taylor*, 340.
- 1780, c. 45. *Smith vs. The State*, 396.
- 1780, c. 49. *Owings vs. Norwood*, 82; *Hall vs. Gittings*, 96.
- 1781, c. 20. *Owings vs. Norwood*, 82.
- 1782, c. 23. *Laidler vs. Young*, 59.
- 1785, c. 72. *Jones vs. Jones*, 245.
- 1786, c. 45. *Smith vs. Smith*, 271; *Reinicker vs. Smith*, 361.
- 1795, c. 56. *M'Coy vs. Swan*, 293.
- 1797, c. 110. *Baker vs. The State*, 5.
- 1797, c. 114. *Brogden vs. Walker*, 248.
- 1798, c. 101. *Norfolk vs. Gantt*, 378.
- 1807, c. 52. *Hollingsworth vs. M'Donald*, 197.

## TENANCY IN COMMON.

A tenant in common, under the Act to Direct Descents, may dispose of his interest in any particular portion of the estate so held in common. *Reinicker vs. Smith*, 361.

## TRESPASS.

1. In an action of trespass *q. c. f.* on a tract of land called G. D. the defendant took defence for a tract of land called A. on a part of which the alleged trespass was committed—*Held*, that the plaintiff was only entitled to recover for a trespass committed within the lines of the tract called G. D. as the same was located by him on the plots in the cause, although he had been in the possession and cultivation of the land on which the trespass was alleged to be committed, claiming the same as part of G. D. for upwards of 50 years, and it had always been called and reputed as part of that tract. *Chapman vs. Brarner*, 314.
2. In trespass *q. c. f.* the defendant took defence for, and located on the plots, a tract of land called G. C. which included the tract called T. N. on which the trespass was alleged to have been committed.

**TRESPASS.—Continued.**

and which last tract the plaintiff located on the plots; and he also located lot No. 3,351; but he did not counter-locate the location made by the defendant. The defendant read in evidence the grant of G. C. which called to begin at the end of the second line of lot No. 3,351.—*Held*, that it was not necessary for him to produce the grant of lot No. 3,351, to prove the location of that lot, and the beginning of G. C. *Tomlinson vs. Rizer*, 376.

3. In an action of trespass *q. c. f.* the Court refused to direct the jury, that if the plaintiff, 20 years before bringing the action, ran his land in the presence of the defendant to a point, marked on the plots in the cause, as a boundary between his land and the land of the defendant, and the several lines from that point to certain other points, also marked on the plots, as divisional lines between them; and if the defendant has at no time committed any trespass over said divisional lines, in such case he is not a trespasser, and not liable to the action, unless he was previously warned or forbidden to come to said lines. *Thomas vs. Thomas*, 426.

**TROVER.**

1. Where a mother, as the natural guardian of her infant children, who were under the age of 14 years, hired a slave belonging to them, to a sea captain, to perform a voyage on wages, the slave to be returned, &c. and the vessel being sold at the port to which she sailed, by her owners, the slave was put by the captain on board of another vessel bound home, and furnished with provisions for the voyage, but never returned home. In an action of trover by the children, prosecuting by their *prochein amy*, against the captain, for the value of the slave—*Held*, that the action was well brought. *Hay vs. Conner*, 296.
2. In an action of trover, brought by an employer against his overseer, to recover the value of a hhd. of tobacco made on the plantation of the plaintiff, and inspected in the name of the employer, and the note delivered to the overseer, to be by him delivered to his employer, but which was retained and sold by the overseer as his share of the crop of six hhds. under an agreement entered into between the parties, stipulating that the overseer should have one-sixth part of all tobacco made—*Held*, that the plaintiff was entitled to recover. *Weems vs. Stallings*, 313.
3. Where the plaintiff placed corn in the warehouse of the defendant on storage, and the defendant retained the same for a distinct debt due by the plaintiff, trover lies for such conversion. *Levering vs. Bond*, 261.

**WARRANTY.**

See *SALE*, 2.

**WILLS.**

1. Whether or not a will was legally executed and proved, are matters of fact for the jury; and where the will was made in 1683, they may and ought, from the length of time elapsed, to presume that it had been duly executed and proved. *Hall vs. Gittings*, 96.
2. A paper was exhibited for record as the last will of C. W. proved to have been signed by him at a time when he was about to leave the

State. It was written somewhat in the form of a letter, and stated "If I should not come to you again, my son M. shall pay," &c. Evidence was given that C. W. went to Kentucky, and returned, and that he lived for several weeks thereafter—*Held*, that the paper could not be admitted to record as the last will of C. W. *Wagner vs. M'Donald*, 295.

3. Where the limitation over is in fee after an indefinite failure of issue, it is not good as an executory devise, because of its tendency to create a perpetuity by rendering property unalienable. *Drury vs. Grace*, 305.

In expounding wills, the first and great principle to be observed is, that the intention of the testator is to prevail, unless such intention is opposed by some rule of law. *Ibid*.

- Z. W. by his will, devised as follows: "I devise the whole of my property, real and personal, to my beloved daughter M. W. to her and her heirs forever; and in case she dies without lawful issue, then the whole of my said property is to be possessed by my dear wife A. during her widowhood, and no longer; and at her death or marriage, to be sold at public sale, and the money arising therefrom to be equally divided between H. C. and N." M. W. obtained possession of the property so devised to her, and died in the 17th year of her age, unmarried, and without having any issue, having by her will manumitted all her slaves. A. the widow of the testator, is now living, having in the life-time of M. W. married one R. B. Negro Grace, one of the slaves manumitted by M. W. petitioned for her freedom against H. C. and N.—*Held*, that the limitation over in the will to A.: during her widowhood, constituted a good executory devise, because it was to take effect on the contingency of M. W. dying without leaving issue at the time of her death, and that the petitioner is not entitled to her freedom. *Ibid*.

*See* DEBTOR AND CREDITOR, 2.

ESTATES TAIL, 1, 4, 5, 6.

EVIDENCE, 10.

#### WITNESS.

*See* EVIDENCE.

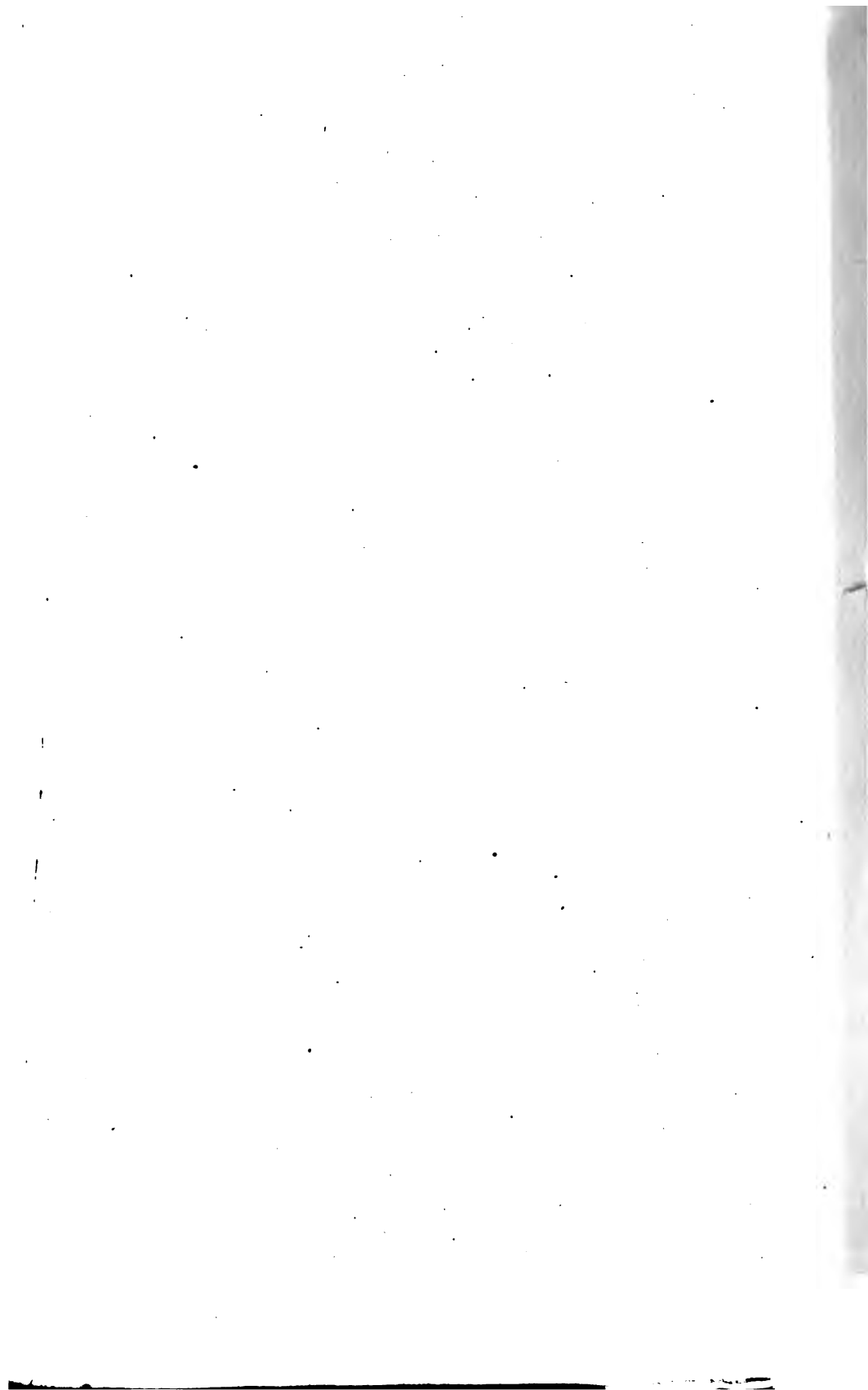














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